(16,471.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 692.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 In the Supreme Court of the United States.

To the honorable justices of the Supreme Court of the United States:

The petition of Engelbert Meyer respectfully represents that he is aggrieved by a final judgement of the supreme court of appeals of Virginia, the highest court of that State, entered on the 20th day of February, 1896, in an action of tresspass on the case, wherein he was plaintiff and The City of Richmond, a municipal corporation, and The Chesapeake & Ohio Railway Company, a corporation, were defendants.

A transcript of the record of said judgement is herewith presented, by which it will appear that your petitioner, in the month of August, 1895, filed his declaration in the law & equity court of the city of Richmond, in which he set forth his cause of complaint against the said defendants as follows:

That he was the owner in fee of a lot of land fronting on Eight-street between Cary and Canal streets, on which were located two brick buildings, the first floor of which was used for store purposes and the second story as dwellings; that said property, previous to the obstruction of Eight- street, as hereinafter described, was very profitable as an investment, being continuously rented to good tenants, who promptly paid remunerative rents for the same; that on the 25th day of June, 1886, the city council of Richmond, by ordinance, authorized the Richmond & Alleghany Railway Company to obstruct for the distance of sixty feet (commencing at Canal street in the direction of Cary street) Eight- street, and by virtue of which said railway company wholly obstructed and occupied said street for said distance with its tracks, sheds, fences, etc., except to pedestrians, for whom said company was required to provide by overhead bridge and stairway approaches thereto. It was averred in said declaration that by means of this obstruction, so made by said company by authority of said

2 city, travel along said street was arrested and the property rights of your petitioner, as an abutter upon said street, *was* not only substantially injured, but practically destroyed; that the city had no right under the Constitution and laws of the land to authorize the said railroad company to close said street or place obstructions therein without proper legal proceedings for that purpose and the making of just compensation to suc- abutting owners as might be injured by said action; that this unconstitutional and illegal action rendered said defendants liable to your petitioner, as trespassers on his property, for all damages that he had sustained not common to the public; that the obstruction- were in themselves nuisances which the city was charged with the duty of abating and moving, and that every day's continuation of the same was a new offense; that the rights, privileges, and obligations of said Richmond & Alleghany Railway Company had been legally transferred to and assumed by said Chesapeake & Ohio Railway Company, and that it, the said last-

named company, now maintained the said onstructions and was therefore liable, jointly with said city of Richmond, for the said trespasses. A plat of the *locus in quo* and a copy of said ordinance were made parts of said declaration.

That on the 27th day of December, 1895, the defendants having entered a general demurrer to said declaration and to each court, in which the plaintiff joined, the court gave judgement for said defendants and dismissed the said suit, and on the 31st day of January, 1896, during the same term, the plaintiff moved the court to set aside the said judgement and annul it and render judgement for him on said demurrer "solely on the ground that the act of the General Assembly of Virginia approved May 24th, 1870, providing a charter for the city of Richmond (Acts 1869–'70, p. 120), so far as it is attempted to authorize the passage of the ordinance in the declaration mentioned, as well as said ordinance, was unconstitutional and void because in conflict with the fourteenth
3 amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law," but the court overruled this motion and refused to set aside said judgement, to which action your petitioner excepted and filed a bill of exceptions, which was signed, sealed, and enrolled as a part of the record.

That on the 20th day of February, 1896, your petitioner presented to the supreme court of appeals of Virginia a petition fully setting forth the foregoing state of facts and insisiting that the said act of the General Assembly and said ordinance were void because in conflict with the fourteenth amendment of the Constitution — the United States, and therefore praying a writ of error to said judgement, and that the same might be reviewed and reversed, but the said supreme court of appeals rejected said petition and refused said writ of error.

Now, your petitioner avers that said judgement of the supreme court of appeals is wholly erroneous and should be reviewed and reversed by this honorable court.

The ground on which the defendants sought to justify the closing of the street which it was admitted caused the damage complained of in the declaration was that section 19 of the act of the General Assembly of Virginia, providing a charter for the city of Richmond (Acts 1869–'70, p. 120), authorized the city council to pass an ordinance closing any street of said city, and that the ordinance, a copy of which is filed with the declaration, was passed in conformity with said charter, while, on the other hand, it was contended by your petitioner that said act of the General Assembly so attempting to authorize the closing of a street without providing some reasonable mode of ascertaining and paying damages to property-holders specially injured thereby was unconstitutional, and therefore void.

4 It was then and is now urged *urged* upon the attention of the court that under the Constitution and laws of the land the free and uninterrupted use of public highways once dedicated to and accepted by the public or acquired by right of eminent domain are for continuous public use, and that the right of access

to and user of such streets by an abutting-property holder is property of which the owner cannot un-er the Federal Constitution be deprived without due process of law. 2 Dillon on Mun. Cor., sec. 587*b* and 587*c*; Tiedman on Mun. Cor., sec. 301; Elliott on Roads and Streets, sec. 658; Taylor's case, 29 Grat., 793; Story *v.* Elevated R. R. Co., 90 N. Y., 122, 178, '9; Larh's case, 104 N. Y., 268.

Any person or corporation diverting the highway from its proper use disturbs the right of property and is a trespasser and must answer in damages at the suit of the owner. Elliott on Roads and Streets, sec. 536; Eliz., Lex. & Big. S. R. R. *vs.* Combs, 10 Bush.

Your petitioner submits that the power granted by the General Assembly in the charter to the city "to close or extend, widen or narrow, lay out and graduate, pave or otherwise improve streets and public alleys in the city" cannot reasonably be tortured into conferring the power to grant to a corporation the right to occupy exclusively a public street for its private benefit with its tracks, sheds, fences, depots, etc., but even if such power could be conferred, yet it could not be so done without providing by due process for condemnation and just compensation to owners of property injured by such closing of the street.

In the case of Scott *vs.* McNeal, 154 U. S., 34, Mr. Justice Gray, speaking for this court, said:

"The fourteenth article of amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. These prohibitions extend to all acts of the State, whether through its legislature, its executive, or its judicial authorities, and the first one, as said by Chief Justice Waite in United States *vs.* Cruikshank, 92 U. S., 544, repeating the words of Mr. Justice Johnson in Bank of Columbia *vs.* Okely, 4 Wheaton, 244, was intended to secure the individual from the arbitrary exercise of the powers of argument unrestrained by the established principles of private rights and distributive justice."

The court of appeals of New York, in perhaps the most ably argued case that ever came before that tribunal, speaking on the subject of diverting public highways from their legitimate use, said: "He (the owner of property on the street) is therefore compelled to pay for them at their full value, and if in the next instance they may by legislative authority be taken away or diverted to inconsistent uses a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property. * * * Any law which destroys property or its value or takes away any of its essential attributes deprives the owner of his value." Larh *v.* Met. E. Railway Co., 104 N. Y., 286.

In the case here there was no pretense that there was any effort to assess the damages to which your petitioner was entitled by reason of having his property thus taken, nor was there any claim,

or suggestion even, that there was any law, statute, or ordinance making any provision whatsoever for assessing such damages.

"To construct a railroad in a public highway without compensation to the adjoining owner is the taking of private property for public use without lawful authority and constitutes a nuisance, and every day's continuance of it is a legal wrong." Mahon *v.* N. Y. Cen. R. R. Co., 24 N. Y., 660.

See also Kelly *v.* Kansas City, 69 Mo., 109; Fort Worth *v.* Crawford, 8 A. & E. Coc. cases, 406; Strange *v.* Dubuque, 62 Ia., 303, and Chicago *v.* Robins, 2 Black, 418.

The contention in the court below was that your petitioner could not be heard to complain that his constitutional rights had
6 been infringed, because his declaration showed that his property did not directly abut on that part of the street which was obstructed, establishing this as a criterion by which to test the question of special damage.

It is not denied by your petitioner, but freely admitted, that one of the essential elements of his right to recover in an action of this nature is the fact that he has sustained some special damage to his property by the obstructions placed in the highway. In 1 Addison on Torts, sec. 279, it is laid down that "no one can have an action for an obstruction or nuisance in a common highway without assigning some particular damage to himself individually, independent of general inconvenience to himself as one of the public." The ancient way of stating the principle is this, "Without special grief shown by the plaintiff the action lies not, but is punishable by the leet." Fincux *v.* Horenden, Cro. Eliz., 664.

The cases that recognize this elementary principle are numerous and need not be cited here. Many of them are collected in notes 6 and 7 on page 500 of Elliott on Roads and Streets.

It is true that some of the courts in seeking to find some inflexible rule by which to determine what are general and what special damages have undertaken to draw a hard and fast line between them by making every case turn on the mere physical fact of the property injured abutting on the obstructed part of the street, but your petitioner submits that such is not the determination of the best-considered cases.

Of the English cases on this precise point the one spoken of as the leading case (decided in 1835) is Wilkes *v.* Hungerford Market, 2 Bing. N. C., 281, more fully reported in 2 Scott, 446. The plaintiff, a bookseller, having a shop by the side of a public thoroughfare, Craven street, suffered in his business in consequence of passengers having been diverted from the thoroughfare by an authorized obstruction across it. After verdict for the plaintiff for
7 £30 the question was carefully argued on a motion for a nonsuit, and all the cases from the Year Book down were carefully examined. The special damage there alleged and sustained was loss of trade which but for the obstruction the plaintiff would have enjoyed, and for that an action was held to lie. See also Senior *v.* Met. Railway Co., 2 H. & C., 258 (1863).

Benjamin *v.* Starr Law Rep., 9 C. P., 400 (1874); Baker *v.* Moore,

Lord Raym, 491; Iverson *v.* Moore, 1 Lord Raym, 495; Fritz *v.* Hobson, L. R. Ch'y Div., 542, cited in Comyn's Digest (5th edition), vol. 1, p. 278.

The case of Rigney *v.* Chicago, 102 Ill., 64, is directly in point. It was an action on the case instituted to recover damages alleged to have been sustained by reason of construction by the city of a viaduct or bridge along Halstead and across Kenzie streets at their intersection, some 220 feet west of the plaintiff's premises, fronting on Kenzie street, which cut off all communication with Halstead street by way of Kenzie except by means of a pair of stairs at the intersection of these streets. It was held that the city was liable. Mr. Chief Justice Dickey, in discussing the question, concludes thus: "The right of action does not depend upon the distance between the lot and the improvement (obstruction); this depends upon the nature and character of the improvement and upon the question whether the property of the claimant is materially damaged." This principle, thus laid down in this case, has been since approved by the same court in Joliet *v.* Blower, 155 Ill., 416, and the case has been cited approvingly by this honorable court in Chicago *v.* Taylor, 125 U. S., at page 168.

In Penn. C. *v.* Stanley, 10 Ind. Appeal, 421 (decided in 1894), Garin, J., speaking on the precise point, said: "In order to authorize a recovery by appellee it is not necessary that the obstruction should have been immediately in front of or touching upon his real estate."

8 To the same effect is Dantzer *v.* Ind. M. R. Co., 39 N. E. R., 224; S. C., 141; Indiana R., 604, where many of the authorities are reviewed and the conclusion reached that "the obstruction of the easement of access need not always be upon the immediate front of the lot the owner of which is affected, but if the obstruction, though remote, render access to such lot impossible or impairs it in any substantial manner at a point where it abuts upon the street the property right of the lot-owner is invaded, and he may recover."

In Johnston *v.* Old Colony R. R. Co., 28 R. I., 642, the supreme court of Rhode Island, also speaking on this exact point, said: "If a railroad can block up one side without liability for damage, why cannot another railroad block up the other side with equal exemption from liability, and thus leave a man's estate bottled or bagged up without paying damages? There can be no doubt that this lopping off of the approach to one's estate takes value from it; in fact, such approach is the very key of its value. The travel past estates in cities is what in large measure constitutes both their selling and renting value. If one pays his money directly for such approaches, as he does when he buys on a plat approaches that he relies on to be travelled over and make his estate central, why should a railroad appropriate such approaches and deprive him of the right of its becoming central without also paying for it? It is practically robbing one to enrich another, for, though a railroad corporation so far as to entitle it to the right of eminent domain in its behalf, the shareholders are individuals who are enriched by

every such favor granted to it. It is common knowledge that the more centrally located an estate is the more value it is, and that ordinarily, when an estate is removed by one single act and in a single day off of a much-travelled way and isolated and cooped up in a mere *cul-de-sac*, more or less value is thereby taken out of it. Such damage in such a case as the one at bar does not seem to us in-
9 direct or remote, but direct and proximate. It is difficult to conceive what constitutes injury to an estate if lopping off its approaches which one has bought does not."

The supreme court of California in the case of Eachus *v.* Los Angel*l*es R'y Co., 103 Cal., 617, said: "The right of the owner of a city lot to the use of a street adjacent thereto is property which cannot be taken from him for public use without compensation, and any act by which this right is impaired is to that extent a damage to his property. When a city subdivides a tract of land of which it is the owner into blocks and streets and sells the same it thereby dedicates the streets to public use, and the purchaser of one of these lots acquires an easement in the street fronting upon his lot and in which he has a right of property as fully as in the lot itself, and any subsequent act of the municipality by which the easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally."

See also Railroad *v.* Applegate, 8 Denio, 310; Bentley *v.* Atlanta, 92 Ga., 623.

Wherefore your petitioner insists that he is deprived of his constitutional rights, and therefore prays a writ of error to the said supreme court of appeals of Virginia, and that the decision complained of be reviewed and reversed.

And, as in duty bound, your petitioner will ever pray, &c.

ENGELBERT MEYER,
By Counsel.

POLLARD & SANDS, *p. q.*

Richmond, Va.

Writ of error allowed. Bond for $500 for costs.
May 25th, '96.

JOHN M. HARLAN,
Justice Sup. Ct. U. S.

10 [Endorsed:] Engelbert Meyer vs. City of Richmond and Ches. & Ohio Railway Co. Petition.

11 VIRGINIA:

In the Supreme Court of Appeals Held in the State Library Building, in the City of Richmond, on Thursday, February 20th, 1896.

The petition of Engelbert Meyer for a writ of error from a judgment rendered by the law and equity court of the city of Richmond on the 31st day of January, 1896, in a suit in which the petitioner was plaintiff and The City of Richmond and The Chesapeake and Ohio Railway Company were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court, being of opinion that said judgment is plainly right, doth reject said petition.

The following are copies of the petition and transcript of record referred to in foregoing order:

Petition.

In the Supreme Court of Appeals of Virginia.

MEYER
vs.
CITY OF RICHMOND and CHESAPEAKE AND OHIO RAILROAD CO.

To the honorable judges of said court:

The petition of Engelbert Meyer respectfully represents that he is aggrieved by a final judgment of the law and equity court of the city of Richmond entered on the 31st day of January, 1896, in an action of trespass on the case, wherein your petitioner was plaintiff and The City of Richmond and The Chesapeake and Ohio Railway Company were defendants.

A transcript of the record of the said judgment is herewith presented, by which it will appear that your petitioner at the August rules, 1896, filed his declaration in the said action in which he set forth the following case:

That he was the owner in fee of a certain lot of land in Richmond city, lying and fronting on Eighth street between Cary
12 and Canal streets, on which were two brick buildings, the first story of which was used for store purposes and the second story as dwellings; that said property previous to the obstructing of the said Eighth street, as hereinafter described, was very profitable as an investment and was easily rented to tenants, who paid promptly good rents for the same; that on the 28th day of June, 1886, an ordinance of the said city of Richmond was approved by the mayor of said city, by which the Richmond and Alleghany Railway Company was authorized to obstruct, for the distance of sixty feet, that part of Eighth street commencing at Canal and running north in the direction of Cary street, by virtue of which said railway company wholly obstructed said street with its tracks, sheds, fences, etc., except as to pedestrians, who might pass and repass these obstructions by means of an overhead bridge

and approaches thereto by stairways; that by means of this interference with the travel along said street the property rights of your petitioner, as an abutter upon said street, were injured and practically destroyed; that the said city had no right under the constitution and laws of the land to authorize the said railroad company to place the said obstructions in said street; that said obstructions were in themselves nuisances which said city was charged with the duty at common law and under its charter to abate and remove, and that every day's continuation of same was a new offence; that the rights, privileges, and obligations of the said Richmond & Alleghany Railway Company had been transferred to and assumed by the said Chesapeake and Ohio Railroad Company, and that for this reason, as well as on account of the nature of the offence complained of, the said Chesapeake and Ohio Railway Company was liable to your petitioner in damages.

13 That a plat showing the *locus in quo* of said property and obstructions and the said ordinance were made parts of the declaration. Your petitioner further shows that on the 27th day of December, 1895, the defendants having before entered a general demurrer to said declaration and to each count, in which the plaintiff joined, the court gave judgment on said demurrer for the defendants and dismissed your petitioner's suit, whereupon your petitioner moved the court to annul its said judgment, and the court, not being then advised as to its decision on said motion, continued the same until the 31st day of January, 1896, when it overruled said motion, and thereupon the plaintiff again moved the court to set aside said judgment "solely on the ground that the act of the General Assembly of Virginia approved May 24th, 1870, providing a charter for the city of Richmond (Acts 1869–'70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the fourteenth amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law;" but the court overruled said motion and refused to set aside said judgment; to which action your petitioner excepted and filed a bill of exception, which was signed, sealed, and enrolled, and made a part of the record.

Your petitioner now insists that the said law and equity court erred in sustaining said demurrer to his declaration, and also in refusing to set aside its judgment so holding as set forth in his bill of exception.

Your petitioner therefore humbly submits—

14 That under the constitution and laws of this State the free and uninterrupted use of public highways once dedicated to and accepted by the public or acquired by right of eminent domain are for continuous public use, and that the right of access to and user of such streets by an abutting-property holder is property of which the owner cannot under the Federal Constitution be deprived without due process of law.

(*a.*) A highway once lawfully established is for continuous public use as such. Tiedman on Municipal Cor., sec. 301. "Once a high-

way always a highway" is a maxim of the common law, and not even the legislature can take away such right without compensation. Elliott on Roads and Streets, sec. 658; Taylor's case, 29th Gratt., 793.

This doctrine is expressly recognized in Story *vs.* N. Y. Elevated R. R. Co., 90 N. Y., 122, where the court, at page- 178, '9, said:

"The ownership of such an easement is an interest in real estate, constituting property, within the meaning of that term as used in the constitution of the State, and requires compensation to be made therefor before it can be lawfully taken for a public use." Larh's case, 104 N. Y., 268.

(*b.*) The owner of land abutting on a street "has other rights peculiar to himself which rest upon the relation of his lot to the street, coupled with the further and equally important fact that, by virtue of his ownership of that lot, he is charged with his private share of the expense of improving and maintaining the street in a condition for public use. These rights, which are necessary to the proper enjoyment of his property, are as much property as the land which he owns and equally within the protection of the constitution and laws." Tiedman on Mun. Cor., sec. 301; see also 2 Dillon on Mun. Cor., sec. 587*b* and 587*c*.

15 "This (the easement of access) is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation." Elliott on Roads and Streets, 526.

(*c.*) Any person or corporation diverting the highway from its proper use disturbs the right of property and is a trespasser and must answer in damages at the suit of the owner. Elliott on Roads and Streets, sec. 536, and Elizabeth, Lex. and Beg. S. R. R. *vs.* Combs, 10 Bush., 382.

The said law and equity court in sustaining the said demurrer denied to your petitioner his constitutional rights, and specially so did it in refusing to set aside its judgment when its attention was called to the unconstitutionality of the act of the General Assembly of Virginia approved May 24th, 1870 (Acts 1869, '70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, because in conflict with the fourteenth amendment, which prohibits any State from depriving any person of property without due process of law, there being no mode prescribed in said act of the General Assembly or in said ordinance for the divesting him of his said property rights by any judicial proceedings whatsoever.

The declaration, after alleging the ownership of the lot described, alleges that the defendant The City of Richmond did by an ordinance approved June 28th, 1886, unlawfully close a part of Eighth street, and did unjustly and unlawfully allow the Richmond and Alleghany Railway Company, of which the Chesapeake and Ohio Railway Company was the successor, to erect sheds in and fences across said street, which obstructed the free use of said street, whereby the plaintiff was deprived of the free use of said street as

a highway, and by means of which he was greatly damaged
16 in the use and enjoyment of his property and deprived of great gains therefrom, in the aggregate amounting to $5,000.00.

On demurrer these broad and sweeping statements must be taken as true, and the defense set up was that though true, yet there was no cause of action because the city of Richmond had a right to authorize said railroad company to close said street, even without any process or proceeding whatsoever against your petitioner.

There can be but little dispute as to the proper meaning of the term "due process of law." Mr. Cooley in his work on Constitutional Limitation says: "Due process of law in each particular case means such exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley on Con. Lim., p. 441, 4th edition.

The case of Taylor *vs.* Miles, 5 Kan., 498, determines that "due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of common law or the provisions of the Constitution, would be a protection to him or his property."

Mr. Justice Field in Pennoyer *v.* Neff, 95 U. S., 733, in discussing the scope and meaning of this term, as used in the fourteenth amendment, said:

"Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings.
17 They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

This statement of the meaning of the term has but recently been approved in the latest case bearing on this subject, determined in the same court in Scott *v.* McNeal, 154 U. S., 34.

In this last case Mr. Justice Gray, delivering a unanimous opinion of the court, said:

"The fourteenth article of amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibi-

tions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities—Virginia *v.* Rives, 100 U. S., 313, 318, 319; *Ex parte* Virginia, 100 U. S., 339, 346; Neal *v.* Delaware, 103 U. S., 370, 397—and the first one, as said by Chief Justice Waite in United States *v.* Cruikshank, 92 U. S., 542, 554, repeating the words of Mr. Justice Johnson in Bank of Columbia *v.* Okely, 4 Wheat., 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

18 In the case here there was no pretense that there was any effort to assess the damages to which your petitioner was entitled for having his property taken, nor was there any provision in the act of the General Assembly or of the city ordinance making any provision whatsoever for assessing such damages.

The court of appeals of New York, in the most celebrated and perhaps the most ably argued case that ever came before that tribunal, said:

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location and are not enjoyed by the general public, such as the right to free access to his premises.

These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instance they may, by legislative authority, be taken away and diverted to inconsistent uses a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

"Any law which destroys property or its value or takes away any of its essential attributes deprives the owner of his property." Lahr *v.* Met. Elevated Railway Co., 104 N. Y., 286.

"At common law depreciation of property by agencies that would destroy its value would undoubtedly be a ground for the recovery of damages. The maxim *sic utera tuo ut alienum non leadas* embodies this duty, and the law must enforce it or the maxim would be idle. West. A. R. R'y Co. *v.* Hill, 56 Penn. St., 460. The

19 application of this maxim was made by this court in R., F. & P. R. R. Co. *v.* City of Richmond, 26 Gratt., 83, and affirmed in the Supreme Court in that case. 96 U. S., 521.

In Eliz., Lex. and B. S. R. Co. *v.* Combs, 10 Bush, 382, it was said:

"It being conceded that the owners of adjacent lots have a peculiar private right in the street which is appurtenant to their lots, and as much property as the lots themselves, we cannot escape the conclusion that there may be such an appropriation of the street as will give the lot-owner a private right of action against those who appropriate it, as to exclude him from its reasonable use,

although such appropriation may be expressly authorized by the terms of the legislative or municipal grants."

The Supreme Court of the U. S. has frequently sustained the view contended for under this head. It said in Salt Lake City *v.* Hillister, 119 U. S., 260:

"But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it is a naked trespasser and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises; but if the governing board had directed the act the corporation could be sued for the tort in an action of ejectment or in trespass or on an implied assumpsit for the value of the land. A plea of *ultra vires* in this case would be no defense."

20 Such a holding directly follows the elementary principle that actions for a trespass may be brought either against the hand actually committing the injury or against the person or corporation by whose order or authority the act is done (1 Addison on Torts, sec. 422), from which follows that both as well as either joint tort-feaser may be sued in the same action (1 Barton Prac., 247), and to show a liability on either will entitle the plaintiff to recovery against the one shown to be liable. Davis *v.* Frank, 33 Grattan, 413.

In the court below the defendants relied upon the case of Home Building and Conveyancing Co. *vs.* City of Roanoke, 20 S. E., 895, as authority to justify the city in allowing Eighth St. to be obstructed, but that case cannot be perverted into sustaining any such position. There the learned judge (Cardwell) who delivered the opinion of the court placed the judgment of the court, in denying the liability of the city, expressly on the ground that the city in what it was doing was improving the streets to promote the public good, not allowing "a private corporation to place additional burdens upon the servitude of a public highway for private gain." See opinion on p. 897. Judge Cardwell wisely recognized the same distinction that the Supreme Court made in Taylor *v.* Chicago (125 U. S., 164, in distinguishing the case of Transportation Company *v.* Chicago (99 U. S., 635) from Pumpelly *v.* Green Bay Co. (13 Wall., 166). Let the court read the ordinance, and if it can say that the city council had in view the improvement of the streets, then let the judgment be affirmed.

The practical effect of the ordinance was to make Eighth street from Cary south to the obstruction (on which the plaintiff's lot abutted) a mere *cul-de-sac.* If it was legal to close Eighth St. at its entrance into Canal, it was equally legal to close it at its

21 entrance into Cary, and thus deprive your petitioner of all access to his property, for there is no alley in the rear of his

lot through which he could "eke out an inconvenient access with the outside world."

"To construct a railroad in a public highway without compensation to the adjoining owner is the taking of private property for public use without lawful authority and constitutes a nuisance—a perpetual nuisance—and every days' continuance of it is a legal wrong." Mahon *v.* N. Y. Central R. R. Co., 24 N. Y., 660; see also Kelly *v.* Kansas City, 69 Mo., 109; Fort Worth *v.* Crawford, 8 A. & E. Cor. cases, 406; Strange *v.* Dubuque, 62 Ia., 303, and Chicago *v.* Robbins, 2 Black, 418.

In Balto. & Pat. R. R. *v.* Fifth Bap. Church, 137 U. S., 568, the Supreme Court approved the elementary principles stated by Blackstone:

"Indeed, every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie." 3 Black. Com., 220.

By a continuation of the nuisance complained of in the declaration by the defendant company, authorized by the defendant city, the plaintiff has suffered the damages alleged, which damages by the demurrer are admitted and for which he asked redress.

The defendant company is liable for the whole injury, for "a person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help." Bishop on Non-contract Law, sec. 518, 525.

And the defendant city is likewise liable, for "a corporation has no more right to license or maintain a nuisance than an in-
22 dividual would have" (Dillon on Mun. Cor., 374, 1048, note 2). "The King cannot license the erection or commission of a nuisance, nor can a municipal corporation do so." Dillon on Mun. Cor., sec. 660, 1038, note 1.

All of these elementary principles were approved by this court in the cases of Norfolk *v.* Chamberlaine, 29th Gratt., 534, and Chalkley *v.* City of Richmond, 88 Va., 402.

For these reasons your petitioner prays that the said judgment of the law and equity court of the city of Richmond may be reviewed and reversed.

ENGELBERT MEYER.

POLLARD AND SANDS,
Counsel for Petitioner.

I, Henry R. Pollard, an attorney practicing in the supreme court of appeals of Virginia, do certify that in my opinion the judgment complained of in the foregoing petition should be reviewed and reversed.

Given under my hand this 14th day of February, 1896.

HENRY R. POLLARD.

Transcript of Record.

VIRGINIA:

Pleas before the Honorable Edmund C. Minor, judge of the law and equity court of the city of Richmond, held at the court-room, in said city, on Saturday, the 31st day of January, 1896.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the law and equity court of the city of Rich-
23 mond on the first Monday in August, 1895, came Engelbert Meyer and filed his declaration against The City of Richmond and the Chesapeake and Ohio Railway Co., a corporation created under the laws of Virginia, defendants; which declaration is in the words and figures following, to wit:

Declaration.

In the Law and Equity Court of the City of Richmond.

Engelbert Meyer, plaintiff, complains of The City of Richmond and The Chesapeake and Ohio Railway Co., a corporation created under the laws of Virginia, defendants, of a plea of trespass on the case for this, to wit, that the defendants The City of Richmond long before and on the 28th of June, 1886, was and from thence hitherto has been and still is a municipal corporation chartered by the General Assembly of Virginia by an act approved May 24th, 1870 (Acts 1869–'70, p. 120), clothed with all powers conferred and subject to all the duties and liabilities imposed by its charter and incident to its incorporation, and thereby it became and was the duty of said city of Richmond to keep in good order for the use and benefit of the public, and specially for the adjacent owners, the streets and public highways in said city and to prevent and remove any and all structures, obstructions, and encroachments in any street, alley, or sidewalk thereof, and particularly in Eighth street from Cary street to Canal street, in the city of Richmond aforesaid, which said Eighth street between said Cary street and Canal street was on the day and year aforesaid and from thence hitherto has been and still is not in good order and free from obstructions and encroachments and is unserviceable for said purposes; and whereas the plaintiff on the — day of ——, 189–, was and still is lawfully seised in fee-simple of a certain messuage and premises, on which is
24 built two brick store-houses and dwellings over said stores, with the appurtenances, situate and being in the city of Richmond, at the southwest corner of Cary and Eighth streets, and bounded as follows, to wit: Beginning on the west side of Eighth street at its intersection with the south line of Cary street, running thence southerly along the west line of Eighth street thirty-eight feet four inches; thence at right angles to Eighth street and running westerly parallel with Cary street fifty feet; thence running northerly and parallel with Eighth street thirty-eight feet four inches to Cary street, and thence running easterly along the south

line of Cary street fifty feet to the place of beginning, and being the same real estate conveyed to the said Englebert Meyer by Ellis Brown and Virginia, his wife, by deed dated 12th day of April, 1859, and duly recorded in the clerk's office of Richmond chancery court in Deed Book 74 A, page 18, and particularly described in the plot hereto attached as a part of this declaration, adjacent to and abutting on said highway known as Eighth street, in said city, by means of which public highway the plaintiff, his tenants, agents, servants, and all others, on foot, in carriages, wagons, and other vehicles, had free access and approach to said messuage and premises from the direction of Canal street and so back again at all times of the year at their will and pleasure, yet the said defendants, well knowing the premises, to wit, on the day and year aforesaid, wrongfully and unjustly placed divers fences and other structures across the said highway known as Eighth street at a point, to wit, two hundred and fifty-one feet south of Cary street and — feet north of the face of the north wall of the old canal, which fences and other said structures obstructed and closed the said highway and
25 prevented the plaintiff, his tenants, agents, servants, and others, from having the free use of said highway as he and they might otherwise have had, and by means of the premises the plaintiff has also from thence hitherto been deprived of the use of his said store and dwelling upon said messuage and of large gains, profits, benefits, and advantages in the way of rent which he might and otherwise would have acquired from the said stores and dwellings, to wit, of the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is greatly diminished to a great extent, to wit, to the sum of two thousand dollars, and whereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use, and enjoyment of said messuage and premises and has been and still is by means of the premises otherwise greatly injured and damnified.

And for this also, that heretofore, to wit, *that* the said defendant, The City of Richmond, long before and on the 28th day of June, 1886, was and from thence hitherto has been and still is a municipal corporation chartered by the General Assembly of Virginia, clothed with all powers conferred and subject to all the duties and liabilities imposed by its charter and incident to its corporation, and thereby it became and was the duty of said city of Richmond to keep in good order for the use and benefit of the public, and specially for the adjacent owners, the streets and public highways in said city and to prevent and remove any and all structures, obtructions, and encroachments in any street, alley, or sidewalk thereof, and particularly Eighth street from Cary street to Canal street, in the city of Richmond aforesaid, which said Eighth street between said Cary and Canal streets was on the day and year aforesaid and from thence hitherto has been and still is not in good order and free from obstructions and encroachments and is unserviceable
26 as a public street and highway; and whereas the plaintiff on the — day of ——, 189–, was and still is lawfully seized in fee-simple of the messuage and premises in the first count partic-

ularly described, yet the said defendants, well knowing the premises, whilst the plaintiff was the owner of said messuage and premises, with the appurtenances, and whilst there was such obstructions in said highway as aforesaid, to wit, from the — day of ——, 189–, to the bringing of this suit, wrongfully and unjustly permitted certain structures, sheds, and fences to be and continue in and across said highway known as Eighth street at a point between Cary street and Canal street, whereby the plaintiff, his tenants, agents, servants, and others, were prevented from having the free use of said highway as he and they might otherwise have had, and also by means of the premises the plaintiff from thence and hitherto has been deprived of the use of his store & dwelling standing upon said messuage and of large gains, profits, benefits, and advantages which he might and would have otherwise acquired from the use and rent of the same, to wit, of the sum of fifteen hundred dollars, and by which means the value of said property of the plaintiff has been and is greatly damaged and diminished to the extent of two thousand dollars, and the plaintiff thereby has been and still is greatly annoyed and incommoded in the renting, possession, use, occupation, and enjoyment of the said messuage and premises and has been and still is by means of the premises otherwise greatly injured and damnified.

And for this also, that heretofore, to wit, on the twenty-eighth day of June, 1886, the said defendant city, being charged with the duty of keeping the streets of said city in good order and with the duty of preventing obstructions in and compelling the removal of obstructions from said streets, did, by an ordinance approved
27 June 28th, 1886, herewith filed, unlawfully close a part of said Eighth street, and did unjustly and unlawfully allow the Richmond and Alleghany Railroad Company, a corporation created under the laws of Virginia, to erect, and said Richmond and Alleghany Railway Company did erect, certain structures, sheds, and fences across Eighth street at a point, to wit, two hundred and fifty-one feet south of the southern line of Cary street and — feet north of the face of the north wall of the old canal, the ownership and occupation of which said structures, sheds, and fences on the — day of ——, 1888, became and were duly vested in another certain corporation known as the Richmond and Alleghany Railway Company; and thereafter, to wit, on the 20th day of January, 1890, in pursuance of an act of the General Assembly approved December 18th, 1889 (Acts 1889–'90, p. 2, private acts), the ownership and occupation of said structures, sheds, and fences became and were duly vested in the defendant The Chesapeake and Ohio Railway Company, which said structures, sheds, and fences from thence and still are occupied, maintained, and kept by said Chesapeake and Ohio Railway Company; and the plaintiff avers that said structures, sheds, and fences, on the — day of ——, 189–, and from that date to the bringing of this suit, have obstructed the free use of said Eighth street from Cary to Canal street; and whereas the plaintiff was seised in fee-simple estate of the messuage and premises in the first count particularly described, yet the said defendants, well knowing the premises and whilst the plaintiff was

lawfully seised of said messuage and premises, with the appurtenances, and whilst said obstructions remained in said street as aforesaid, to wit, from the — day of ——, 189–, to the bringing of this suit, wrongfully and unjustly permitted the said obstructions to be and continue in said street, and by means of the prem-
28 ises the plaintiff, who, with his tenants, agents, and others, *were* entitled to the free and uninterrupted use of the said street with his and their carriages, wagons, and other vehicles, was prevented by said obstructions from passing and repassing to and from his said messuage and premises in and from the direction of Canal street, and thereby the plaintiff has been and still is deprived of the free use of said street and highway and by means of which he is greatly hindered and damaged in the use and enjoyment of his messuage and premises and deprived of large gains and advantages which he might otherwise have acquired by the renting of the said store and dwelling situate on said messuage and premises, to wit, of the sum of fifteen hundred dollars, by which means the said property of the plaintiff has been and is diminished in its value to the extent of two thousand dollars; and the plaintiff thereby has been unable to rent said property and has been and still is greatly annoyed and injured and put to great trouble and expense, to wit, the sum of two hundred dollars, in and about finding a tenant to occupy said stores and dwellings, and has also laid out and expended large sums of money, to wit, the sum of one hundred dollars, in and about preserving said property from depredations while unoccupied, and by means of the premises is otherwise greatly injured and damnified, to the plaintiff's damage $5,000.00, and therefore he sues, &c.

POLLARD AND SANDS, *p. q.*

Ordinance permitting the Richmond and Alleghany Railroad Company to close a certain portion of Eighth street and requiring them to erect a foot-bridge.

29 (Approved June 28th, 1886.)

Be it ordained by the city council of Richmond—

First. So much of Eighth street as lies between the present southern boundary line of the property of the Richmond and Alleghany Railroad Company, being also the southern boundary line of the right of way of the James River and Kanawha Company, and a line drawn across Eighth street at right angles, sixty feet north of the face of the north wall of the canal as said wall is now built, shall be, and the same is hereby, closed from the 31st day of August, 1886, until it is required to be reopened in accordance with the provisions of this ordinance: Provided, that the said Richmond and Alleghany Railroad Company shall, on or before the said 31st of August, begin to erect an overhead foot-bridge across the tracks and canal of said railroad on that portion of Eighth street above described, and shall complete the same by the 30th day of September, 1886.

Second. The said bridge and the stairways thereto shall be twelve feet wide, and shall be so located, and shall be of such material or materials, designed, security and capacity, as may be required by the city engineer; the same shall always be kept and maintained in such condition and repair as may be from time to time required by the committee on streets of the said city council, and always be open to the free use of the public.

Third. Should the said company fail for the space of ten days to put the said bridge or stairways in such condition or repairs, after having been required so to do by said committee, then the said company shall be liable to a fine of fifty dollars, to be imposed by the police justice of Richmond, and each day's failure to be a separate offence; and the city may in all such cases repair said bridge or stairways, when not done by said company as herein required, and the expense thereof shall be a debt against the said company recoverable as debts are now recoverable by the city of Richmond.

Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of any one being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injuries.

Fifth. The above-described portion of Eighth street shall remain closed until the said Richmond and Alleghany Railroad Company shall have been ordered by the ordinances of two successively elected councils to remove the said overhead bridge, and restore the street to its present condition, and to the same authority and control of the city as existed prior to the passage of this ordinance. Whenever it is so ordered to be reopened, the said company shall be allowed three months from the date of the passage of the last of the said two ordinances in which to remove said bridge and stairways, and to restore said Eighth street to the same condition in which it was before the passage of this ordinance. And should the said company fail to remove said bridge and stairways, and to restore said Eighth street to its former condition, before the expiration of the said three months, then the said company shall be liable to a fine of one hundred dollars, and each day's default shall be a separate offence; and the said city may remove said bridge and stairways, and restore said Eighth street as above mentioned, when not done by said company as above required, and the expense thereof shall be a debt against the said company, recoverable as debts are now recoverable by the city of Richmond.

Sixth. The said company doth, by exercising the privileges herein granted, agree and bind itself and its assigns to make no claim to the land now occupied by that portion of said Eighth street to be closed, on account of said closing or the privileges herein granted, and doth fully recognise and admit the right of the

said city to reopen the said Eighth street at any time, according to the provisions of this ordinance.

Seventh. Nothing in this ordinance shall conflict in any way with the ordinance approved May 12th, 1886, granting permission to the Richmond and Chesapeake Railroad Company to construct a tunnel under Eighth street; and should the bridge constructed under this ordinance obstruct in any manner the said tunnel or tracks leading thereto, it shall be changed by the said Richmond and Alleghany Railroad Company within sixty days after receipt of notice from the committee on streets of the said city council, requiring such change to be made.

A copy.

Teste: BEN. T. AUGUST, *City Clerk.*

(Here follows diagram marked page 32.)

33 Whereupon, the defendants being summoned and not appearing, on motion of the plaintiff, by counsel, it was ordered that judgment be entered for the plaintiff against the defendants for what damages the plaintiff had sustained by occasion of the injury done to the plaintiff by the said defendants in the declaration mentioned unless the defendants should appear and plead to issue at the then next rules.

At which day, to wit, at rules held in the clerk's office of the law and equity court of the city of Richmond on the third Monday in August, 1895.

The defendant still failing to appear, on motion of the plaintiff, by counsel, it was ordered that the last order made against said defendants in this case be confirmed, and that the plaintiff's damages be ascertained by a jury at the then next term.

At another day, to wit, at a law and equity court of the city of Richmond held for the said court on Friday, the 27th day of December, 1895.

This day came again the parties, by their attorneys, and the defendants' demurrer to the plaintiff's whole declaration and to each count thereof entered therein on the 9th day of September, 1895, and on the joiner in said demurrer by the plaintiff, and by consent of parties, by counsel, the map filed with the declaration and the ordinance of the council of the city of Richmond closing a certain portion of Eighth street, approved June 28th, 1886, being considered by the court as a part of the declaration and each count thereof, and to be so considered by the appellate court, and, being fully argued by counsel, it seems to the court that the declaration and the matters therein contained are not sufficient in law for the plaintiff to have and maintain his action against the defendants, the court doth sustain the said demurrer, and it is considered by the court that the plaintiff take nothing by his bill, but that the defendants go thereof without day and recover against the plaintiff their costs by them about their defence in this behalf expended.

And thereupon the plaintiff, by counsel, moved the court to set

aside the said judgment and enter judgment for him on said demurrer, and it being represented to the court that it is the
34 intention of the plaintiff in the case of H. Wythe Davis against The City of Richmond and The Chesapeake and Ohio Railway Company to apply for a writ of error to the judgment of this court entered this day in that cause, and the questions involved in that case being the same as in this case, the court takes time to consider of said motions, and by consent of parties this case is retained on the docket of this court, and the determination of said motions to await the result of the application for a writ of error in the case of H. Wythe Davis against The City of Richmond and The Chesapeake and Ohio Railway Co.

And at another day, to wit, at a law and equity court held for the city of Richmond on the 31st day of January, 1896.

ENGELBERT MEYER, Plaintiff,
vs.
CITY OF RICHMOND and CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendants. } Order.

This day came the parties again, by their attorneys, and the court, being now advised of its judgment to be rendered herein, on the motion of the plaintiff to set aside the judgment rendered on the demurrer to the plaintiff's declaration and to each count thereof, doth refuse to set aside said judgment.

And thereupon the plaintiff again moved the court to set aside said judgment entered on the 27th day of December, 1895, sustaining defendants' demurrer to the declaration and to each count thereof, solely on the ground that the act of the General Assembly of Virginia approved May 24th, 1870, providing a charter for the city of Richmond (Acts 1869–'70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in con-
35 flict with the fourteenth amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street as claimed by said defendants; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted and filed his bill of exception, which was signed, sealed, and enrolled, and made a part of the record.

ENGELBERT MEYER
vs.
CITY OF RICHMOND and CHESAPEAKE AND OHIO RAILWAY COMPANY. } Bill of Exception.

Be it remembered that this day, after the court had overruled the motion of the plaintiff submitted to the court on the 27th day of December, 1895, to set aside its judgment then entered on the de-

murrer, the plaintiff again moved the court to set aside and annul said judgment solely on the ground that the act of the General Assembly of Virginia approved May 24th, 1870, providing a charter for the city of Richmond (Acts 1869–'70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the fourteenth amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law; but the court overruled said motion and refused to set aside said judgment; to which ruling of the court the plaintiff excepted and filed his bill of exception, which he prays may be signed, sealed, and enrolled and made a part of the record, which is accordingly done.

36 E. C. MINOR. [SEAL.]

To C. V. Meridith, att'y for City of Richmond, and Henry Taylor, att'y for Chesapeake and Ohio Railway Company:

Take notice that I shall apply to the clerk of the law and equity court of the city of Richmond for a transcript copy of the record in the suit lately pending in the law and equity court of the city of Richmond, in which said City of Richmond and The Chesapeake and Ohio Railway Company were defendants and I was plaintiff, and in which judgment was rendered in your favor, for the purpose of having the said judgment reviewed by the supreme court of appeals.

Yours very respectfully, ENGELBERT MEYER,
By Counsel.

We accept service of foregoing notice.

CITY OF RICHMOND,
By C. V. MEREDITH.
C. & O. R'Y CO.,
By H. TAYLOR, JR., *Of Counsel.*

I, P. P. Winston, clerk of the law and equity court of the city of Richmond, do hereby certify that the within is a complete transcript of the record of the case of Engelbert Meyer *vs.* The City of Richmond and The Chesapeake and Ohio Railway Company, and that the said City of Richmond and the Chesapeake and Ohio Railway Company have had due notice of the intention of Engelbert
37 Meyer to apply for such transcript and for a writ of error and supersedeas to the judgment from the supreme court of appeals of the State of Virginia.

Witness P. P. Winston, clerk, this fifth day of February, 1895.

Teste: P. P. WINSTON, *Clerk.*

Fee for record, $4.50.

A true transcript of the record.

Teste: GEO. K. TAYLOR, *C. C.*

The fee of the clerk of the supreme court of appeals of Virginia, at Richmond, is eight dollars and ten cents.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record in the case of Engelbert Meyer against The City of Richmond and The Chesapeake and Ohio Railway Company, in which a writ of error was refused by the supreme court of appeals of Virginia.

Seal Supreme Court of Appeals of Virginia, Richmond.

In testimony whereof I hereto set my hand and annex the seal of said court this 28th day of May, 1896.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

38 [Endorsed:] Engelbert Meyer *vs.* City of Richmond and Chesapeake & Ohio Railway Company. Record.

39 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of Ameica to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Engelbert Meyer, plaintiff, and The City of Richmond and The Chesapeake & Ohio Railway Company, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of
40 or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Engelbert Meyer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distintly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington,

within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

41 STATE OF VIRGINIA, } *To wit:*
City of Richmond, }

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ of error is on file in my office.

Given under my hand this 28 May, 1896.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

42 Know all men by these presents that we, Engelbert Meyer, of the city of Richmond and State of Virginia, as principal, and H. Wythe Davis, of the same place, as sureties, are held and firmly bound unto the City of Richmond and the Chesapeake and Ohio Railway Company, corporations duly chartered, &c., in the full and just sum of five hundred dollars, to be paid to the said City of Richmond and the Chesapeake and Ohio Railway Company, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a supreme court of appeals of the State of Virginia, in a suit depending in said court between the said Engelbert Meyer and the said City of Richmond and The Chesapeake and Ohio Railway Company, a decree was rendered against the said Engelbert Meyer, and the said Engelbert Meyer having obtained a writ of error to the Supreme Court of the United States of America and filed a copy thereof in the clerk's office of the said court
43 to reverse the said decree in the aforesaid suit, and a citation directed to the said City of Richmond and Chesapeake and Ohio Railway Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof;

Now, the condition of the above obligation is such that if the said Engelbert Meyer shall prosecute his said writ of error to effect and

answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ENGELB. MEYER. [SEAL.]
H. WYTHE DAVIS. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
WM. FLEGENHEIMER.
A. J. PLEASANTS.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

In the Clerk's Office of the Supreme Court of Appeals of Virginia, at Richmond, on the 28th day of May, 1896.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is
44 a true copy of the original bond, which is on file in my office.

Given under my hand this 28th May, 1896.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

45 UNITED STATES OF AMERICA, *ss:*

To the City of Richmond and the Chesapeake & Ohio Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Engelbert Meyer is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

46 On this second day of June, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared in the city of Richmond before me, the subscriber, John T. Hughes, Jr., deputy sheriff of the city of Richmond, and makes oath that he delivered a true copy of the within citation to R. M. Taylor, mayor of the city of Richmond, and to Chas. E. Potts, cashier of

the Chesapeake & Ohio Railway Company, the said Potts being a resident of the city of Richmond.

J. T. HUGHES, JR., *Deputy*,
For J. T. HUGHES,
Sheriff City of Richmond, Va.

Sworn to and subscribed the 2d day of June, A. D. 1896.

CHAS. O. SAVILLE,
N. P. for the City of Richmond.

Notary fee.....	50 cts.
Sh'ff.....	1 00
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Endorsed on cover: Case No. 16,471. Virginia supreme court of appeals. Term No., 692. Engelbert Meyer, plaintiff in error, *vs.* The City of Richmond & The Chesapeake and Ohio Railway Company. Filed January 19, 1897.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

No. 291.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

versus

THE CITY OF RICHMOND AND THE CHESAPEAKE & OHIO RAILWAY COMPANY,
DEFENDANTS IN ERROR.

IN ERROR TO SUPREME COURT OF APPEALS OF VIRGINIA.

The Case Stated.

This was a common law action of trespass on the case, instituted by the plaintiff in error, in one of the *nisi prius* courts of the city of Richmond, in the State of Virginia, to recover damages of the defendants in error by reason of their interferance with the free use of a street in front of the plaintiff's real property, in that the first named defendant attempted to authorize, and the last named defendant took and appropriated to its own use, without process of law or condemnation, the said street, thereby materially damaging the property of the plaintiff in error. The plaintiff in error is and was at

the time of his suit, the owner in fee of a lot of land fronting on Eighth street, between Cary and Canal streets, in the city of Richmond, Virginia, as shown by the plat filed with the record, on which were located two brick buildings, the first floors of which were used for store purposes, and the second stories as dwellings. Previous to the obstruction of Eighth street, as hereinafter described, the said property was very profitable as an investment, having been for many years continuously rented to good tenants, who promptly paid remunerative rents for same. But the City Council of Richmond, on the 26th day of June 1886, by ordinance (a copy of which appears on pages 17-19 of record) authorized the Richmond & Alleghany Railway Company to obstruct for a distance of sixty feet (commencing at Canal street, running in the direction of Cary street) Eighth street, and by virtue of which said company wholly obstructed and occupied said street, from side to side, for said distance, with its tracks, sheds, fences, etc., except to pedestrians, for whom said company provided, as required by the ordinance, an overhead bridge, with stairway approaches thereto. By means of these obstructions, so made by said company under the authority of the city, travel along the said street in front of the property of the plaintiff was not only interfered with, but practically arrested, and his property not only substantially injured, but, in effect, destroyed. While the ordinance referred to authorized the Richmond & Alleghany Railway Company to make and maintain the said obstructions, yet all the rights, privileges and obligations of said Richmond & Alleghany Railway Company had been, at the beginning of the suit, legally transferred to and assumed by the defendant in error, the Chesapeake & Ohio Railway Company, and that said last mentioned company continued and maintained the said obstructions.

The declaration, found on pages 14-17 of the record, fully sets forth in three separate counts the title and estate

of the plaintiff in error to the property alleged to be damaged, the nature of the trespasses committed by the defendants and the circumstances under which the same were done, and the nature and amount of the damages suffered by the plaintiff. With the declaration profert was made of the act of the General Assembly of Virginia by which the city of Richmond was incorporated; while the ordinance of the legislative body of the city authorizing the closing of the street and also a plot, showing the *locus in quo*, were filed to be considered as a part of the declaration. Thereupon the said defendants filed a demurrer to the said declaration and to each count, in which the plaintiff joined, thereby putting in issue the question whether the city could, by said ordinance, constitutionally and legally authorize the closing of said street, and thereby practically take the plaintiff's property under an ordinance which made no provision for any process of law against the plaintiff, or for the condemnation of his property. The court sustained the demurrer and dismissed the plaintiff's action, and in order more clearly to put on the record the grounds on which the plaintiff insisted on his right of recovery, he filed a bill of exception, which is found on pages 20-1 of record and is as follows:

"Be it remembered that this day, after the court had overruled the motion of the plaintiff submitted to the court on the 27th day of December, 1895, to set aside its judgment then entered on the demurrer, the plaintiff again moved the court to set aside and annul said judgment solely on the ground that the act of the General Assembly of Virginia, approved May 24th 1870, providing a charter for the City of Richmond (Acts 1869-'70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the fourteenth amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law; but the court overruled said

motion and refused to set aside said judgment; to which ruling of the court the plaintiff excepted, and filed his bill of exception, which he prays may be signed, sealed and and enrolled, and made a part of the record, which is accordingly done.

E. C. MINOR, [Seal.]"

Thereupon, the plaintiff, in accordance with the statute in such cases provided, presented a petition to the Supreme Court of Appeals of Virginia, the court of the last resort of that State, asking a writ of error to said judgment, but said court refused the said writ, and on the 20th day of February, 1896, entered an order found on page 7, of record, in the language following:

"The petition of Engelbert Meyer, for a writ of error from a judgment rendered by the Law and Equity Court of the City of Richmond, on the 31st day of January, 1896, in a suit in which the petitioner was plaintiff, and the City of Richmond and the Chesapeake and Ohio Railway Company were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that said judgment is plainly right, doth reject said petition."

From that order the plaintiff in error applied for and obtained a writ of error to this honorable court.

On Question of Jurisdiction.

The ground on which the defendants sought to justify the closing of the street, which, it was admitted, caused the damage complained of in the declaration, was that sub-division VII, of section 19 of an act of the General Assembly of Virginia providing a charter for the city of Richmond (Acts 1869–'70, p. 120,) authorized the City Council to pass oridinances *ad libitum* closing the streets of the city, and that by virtue of this power the Council had authorized the railroad to do what had been done in the premises.

The section of the charter relied on is in the language following:

"19. The City Council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city, and of all property, real and personal, belonging to the said city; and may make such ordinances, orders, and by-laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers, which are hereby vested in them:

* * * * * * *

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve, streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under, said streets; and may prevent or remove any structure, obstruction, or encroachment over, or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along said streets; and no company shall occupy with its works the streets of the city, without the consent of the Council. In the meantime, no order shall be made and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants, are transcending the authority given them by this act and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages."

By reference to the ordinance, made a part of the declaration, under the authority of which the railroad claimed the right to close the street, it will be seen that no sort of provision was made for the ascertainment of damages in

favor of persons whose property was affected by the proposed act. Hence the demurrer raised the question as to whether the said ordinance and likewise the charter of the city, made a part of the declaration, were in violation of the Constitution, and laws of the United States, made in pursuance thereof, But, to make assurance doubly sure, the plaintiff in error moved the trial court to reverse and annul its order dismissing the suit "solely on the ground that the act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city of Richmond, so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void because in conflict with the fourteenth amendment to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law." This not only appears from the bill of exception above quoted, but from the order of the court found on page 20 of the record, which is in the following language:

"And at another day, to-wit: at a law and equity court held for the city of Richmond on the 31st day of January, 1896:

Engelbert Meyer, Plaintiff,
vs.
City of Richmond and Chesapeake & Ohio Railway Company,
Defendants. } Order.

"This day came the parties again, by their attorneys, and the court, being now advised of its judgment to be rendered herein, on the motion of the plaintiff to set aside the judgment rendered on the demurrer to the plaintiff's declaration and to each count thereof, doth refuse to set aside said judgment.

"And thereupon the plaintiff again moved the court to set aside said judgment entered on the 27th day of December, 1895, sustaining defendant's demurrer to the declaration, and to each count thereof, solely on the

ground that the act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city Richmond (Acts 1869–70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in the conflict with the fourteenth amendment to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street as claimed by said defendants; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted and filed his bill of exception, which was signed, sealed and enrolled, and made a part of the record."

The same question was presented to the Supreme Court of Appeals of Virginia, as appears from the following quotations found on pp. 8 and 9 of record:

"Your petitioner now insists that the said Law and Equity Court erred in *sustaining said demurrer to his declaration, and also in refusing to set aside its judgment in so holding as set forth in his bill of exception.*

"Your petitioner therefore humbly submits:

"That under the constitution and laws of this State the free and uninterrupted use of public highways once dedicated to and accepted by the public, or acquired by right of eminent domain, are for continuous public use, and that the right of access to and use of such streets by an abutting property holder *is property of which the owner cannot under the Federal Constitution be deprived without due process of law.*"

"The said Law and Equity Court, in sustaining the said demurrer, denied to your petitioner his constitutional rights, and specially so did in refusing to set aside its judgment when its attention was called to the unconstitutionality of the act of the General Assembly of Virginia, approved May 24th, 1870 (Acts 1869–'70, p. 120), so far as

it authorized the passage of the ordinance in the declaration mentioned, because in conflict with the fourteenth amendment, which prohibits any State from depriving any person of property without due process of law, there being no mode prescribed in the said act of the General Assembly or in said ordinance for the divesting him of his said property rights by any judicial proceeding whatsoever."

We have been thus specific in our statement of the pleadings in this case, in order to show how completely they correspond with the procedure in the recent case of *Railway Co.*, v. *Chicago*, 166 U. S., 226, 231, where Mr. Justice Harlan states the condition of a similar record which he thought necessarily presented a Federal question. He said: "It is sufficient if it appears from the record that such right was specially set up or claimed in the State Court in such manner as to bring it to the attention of that court."

"Now, the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of its laws.

"When the trial court overruled the motion for a new trial and entered judgment, it necessarily held adversely to these claims of Federal right.

"But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois, these claims of rights under the Constitution of the United States were distinctly reasserted.

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State Court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding, so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this court said in *Proprietors of Bridges* v. *Hoboken Land & Improvement Co.*, 68 U. S., 1 Wall., 116, 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution, or act of Congress, was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In *Roby* v. *Colehour*, 146 U. S., 153, 159, it was said that 'our jurisdiction, being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' *DeSaussure* v. *Gaillard*, 127 U. S., 216, 234; *Brown* v. *Atwell*, 92 U. S., 327; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S., 574, 577; *Sayward* v. *Denny*, 158 U. S., 180, 183. There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine upon its merits."

And at page 238, in the same opinion, it was said:

"In *Scott* v. *Toledo*, 36 Fed. Rep., 385, 395, 396, the

late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration, that able judge said: "Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt to do so, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself, or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is, that since the adoption of the 14th amendment, compensation for private property taken for public uses, constitutes an essential element in 'due process of law,' and that, without such compensation, the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.'"

And the residium of the many and voluminous discusssions of this subject could not be better or more clearly stated, than is done by the learned Justice, on page 240.

"In his discussion as to the meaning and scope of the 14th amendment, the same writer, in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the State or National Government,

but that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and, secondly, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them.' 2 Story Const., § 1956.

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state, is a denial by that State of a right secured to the owner by that instrument."

In the case at bar, as before remarked, the ordinance authorizing the taking of the plaintiff's property made no provision whatever for the assessment of damages, or other proceedings looking to a condemnation. This court has frequently held that a hearing is essential to due process of law. On this point it is sufficient to refer to the leading case of *Davidson* v. *New Orleans*, 96 U. S., 97, approved in the recent case of *Fallbrook I. Dist.* v. *Bradley*, 164 U. S., 112.

Inasmuch as the act complained of was sought to be justified by ordinance of the city of Richmond, it is appropriate to conclude the discussion of the question of jurisdiction with the remark that by an unbroken line of decisions from *Weston* v. *City Council*, 2 Peters, 464, to the present time, this court has held that the acts done under the authority of a statute embrace all ordinances of

municipal corporations, as well as acts of State legislatures.

The precise question hereinafter to be discussed has never been presented to or determined by this court, so far as the reported cases show, and is now for the first time raised by the petition. But this court has never shown any disposition to permit municipal corporations to escape from their obligation growing out of their control over the streets, or to allow other corporations to appropriate to their own use private property without making just compensation.

In the case of *Salt Lake City* v. *Hillister*, 119 U. S., 260, it was said:

"But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It has no authority to take the man's land, or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in action of ejectment, or in trespass, or an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defence."

And the Supreme Court of Virginia has been equally emphatic in regard to the rights of abutting owners in highways, and the encroachment thereon by persons or corporations. See *West. U. Tel. Co.* v. *Williams*, 86 Va., 696; *Hodges* v. *Railroad Co.*, 88 Va., 653, and *Chamberlaine* v. *Norfolk City*, 29 Gratt., 53.

In this last case, Christian, J., said: "The City Council having no authority to grant permission to Chamberlaine to extend the steps of his building into the public street, and an ordinance specially forbidding it, such an exten-

sion was an unauthorized obstruction of a public highway, and a nuisance which the corporate authorities had a right to abate."

On the Merits of the Case.

We mantain on behalf of the plaintiff in error this proposition:

That under the Constitution and laws of the State of Virginia, the free and uninterrupted use of highways, once dedicated to and accepted by the public, or acquired by right of eminent domain, are for continuous public use, and that, when relying upon that fact, important public and private property rights have been acquired, the highway cannot be permanently diverted to a private use without proper compensation being made to those injured, and as a consequence, any person or persons so diverting such highway, are trespassers and liable in damages to the parties injured.

In this general proposition several minor propositions are involved:

(*a*) A highway once lawfully established is for continuous public use as such. Tiedman on Municipal Cor., sec. 301. "Once a highway always a highway" is a maxim of the common law, and not even the Legislature can take away such right without compensation. Elliott on Roads and Streets, sec., 658; *Taylor's Case*, 29th Gratt., 793; *Bunting* v. *Danville*, 93 Va., 200.

This doctrine is expressly recognized in *Story* vs. *N. Y. Elevated R. R. Co.*, 90 N. Y., 122, where the court, at page 178–9, said:

"The ownership of such an easement is an interest in real estate, constituting property, within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor, before it can be lawfully taken for a public use."

In another, and perhaps the most celebrated and ably

argued case ever before the Court of Appeals of New York, it was said:

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right to free access to his premises. * * *

"These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instance they may, by legislative authority, be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

"Any law which destroys property, or *its value, or takes away any of its essential attributes, deprives the owner of his property.*" *Lahr.* v. *Met. Elevated Railway Co.*, 104 N. Y., 286.

(*b*) The owner of land abutting on a street has other rights peculiar to himself which rest upon the relation of his lot to the street, coupled with the further and equally important fact that, by virtue of his ownership of that lot, he is charged with his private share of the expense of improving, and maintaing the street in a condition for public use. *These rights, which are necessary to the proper enjoyment of his property, are as much property as the land which he owns, and equally within the protection of the Constitution and laws.*" Tideman on Municipal Cor., sec. 301. See also Dillon on Mun. Cor., sec. 587b and 587c.

"This (the easement of access) is so far regarded as private property that not even the Legislature can take away and deprive the owner of it without compensation." Elliott on Roads and Streets, 526.

(*c.*) "Any person or corporation diverting the highway from its proper use disturbs the right of property and is a trespasser, and must answer in damages at the suit of the owner." Elliott on Roads and Streets, sec. 536, and *Elizabeth, Lex. and Beg. S. R. R.* v. *Combs*, 10 Bush., 382.

In this last case, it was said by the Supreme Court of Kentucky that "if an appropriation of a street, even by legislative and municipal sanction, unreasonably abridges the right of adjacent owners to the use of a street as a means of ingress and egress, they are thereby deprived of a property right without compensation, and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the owner may sustain."

A plot filed with the declaration and made a part of it, shows the *locus in quo*, and that the plaintiff's lot is located on the west side of Eighth street, about the centre of the square, between Cary and Canal streets, and that the obstructions at a distance of twenty-three (23) feet from his lot, occupied about sixty feet from side to side of Eighth street between said lot and Canal street, thus completely cutting plaintiff off from ingress to, and egress from Canal street along Eighth street.

It is not denied, but freely admitted, that one of the essential elements of his right to recover in an action of this nature, is the fact that the plaintiff has suffered some *special damage* to his property by the obstruction placed in the highway.

In 1 Addison on Torts, Sec. 279, it is stated that "no one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public, and the expense of removing the obstruction is not such damage." See also Cooley on Torts, 618, discussing what is special injury entitling a party to redress.

The ancient way of stating the principle is this: "without special grief shown by the plaintiff, the action lies not, but is punishable by the leet," *Fincux* v. *Horenden*, Cro. Eliz., 664.

The cases recognizing the elementary principle are multitudinous, and need not be cited here. Many of them are collected in notes six and seven, on page 500 of Elliott on Roads and Streets.

The declaration, after alleging the ownership of the lot described, alleges that the defendants had unlawfully obstructed Eighth street, placing "divers fences and other structures across the said highway at a point two hundred and fifty feet south of Cary street, and 60 feet north of the fence of the old Canal, which fences and other said structures obstructed and closed the said highway and prevented the plaintiff, his tenants, agents, servants and others from having the free use of said highway as he and they might otherwise have had, and by means of the premises, the plaintiff has, also from thence hitherto, been deprived of the use of his said store and dwelling upon said messuage, and of large gains, profits, benefits and advantages in the way of rent, which he might, and otherwise would, have acquired from said store and dwelling, to-wit: the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is diminished, to a great extent, to-wit: the sum of two thousand dollars, and thereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use and enjoyment of said messuage and premises."

On the demurrer, this broad and sweeping statement of the *special damages*, as set forth in the first count, must be taken as true. The statement in the second count of special damage is equally as comprehensive, and in the third count, the plaintiff alleges that by means of the obstructions he was "deprived of the free use of said street and highway, by means of which he was greatly hindered and damaged in the use and enjoyment of his messuage

and premises, and deprived of large gains and advantages which he might have otherwise acquired by the renting of his said store and dwelling." and in addition to the special damages claimed in the first count, claims "the sum of two hundred dollars in and about finding a tenant to occupy said store and dwelling, and also laid out and expended the sum of one hundred dollars in and about preserving the property from depredations while so unoccupied."

It is submitted with the greatest confidence that these statements of *special damage* fully meet the requirement of the principle above stated. They clearly differentiate the damages specified from that of a "general inconvenience to himself as one of the public."

Some of the courts, in seeking to find some inflexible rule by which to determine what are *general* and what *special* damages, have undertaken to draw a hard and fast line between them by making every case turn upon the physical fact as to the *location* of the obstruction, with reference to the property injured, holding that the property *must necessarily abut the obstruction.* But we submit that such is not the determination in the best considered cases.

Of the English cases, on this precise point, the one that is spoken of as the leading case is *Wilkes* v. *Hungerford Market,* 2 Bing. N. C. 281, more fully reported in 2 Scott, 446 (decided in 1835). The plaintiff, a book-seller, having a shop by the side of a public thoroughfare, Craven street, suffered in his business in consequence of passengers having been diverted from the thoroughfare by an unauthorized obstruction across it for a unreasonable time. After verdict for the plaintiff for £30, the question was carefully argued on a motion for a non-suit, and all the cases from the Year books down were carefully examined and the action sustained. The injury to the general public was that they could not walk in the same track as before, and for that cause alone a private action would not lie, but

the *special injury* to this plaintiff was the *loss of trade*, which, but for the obstruction, he would have enjoyed, and for that an action was held to lie.

Senior v. *The Metropolitan Railway Company*, 2 H. & C. (1863) has a very important bearing on this subject. The plaintiff was a draper and tailor, occupying a shop on Hoy street, which he hired at a year's rental of £26. The defendant constructed their road across Warner street, nearly in front of the plaintiff's shop, which was about thirty yards from the railroad bridge on Warner street. The plaintiff claimed damages for the loss of his business by the obstruction to free travel, which before existed, and not at all for injury to the property *per se*, as he did not own it. A verdict for £60 for loss of business alone was sustained after full argument.

In *Benjamin* v. *Starr*, Law Rep., 9 C. P., 400 (1874), the plaintiff kept a coffee-house on Rose street, a narrow street near Covent Garden. The defendants had a place of business fronting on King street, but with a rear entrance on Rose street, close adjoining plaintiff's premises. The defendants kept their teams loading and unloading at their rear entrance so large a part of the time that the plaintiff was obliged to burn gas all day for light, and access to his shop was materially obstructed, and the stench arising from the horses was so offensive as to materially lessen the business and profits of the coffee-house; and while the general rule was fully recognized, it was held sufficient private damage, and a verdict for £75 was sustained.

In the case of *Baker* v. *Moore*, cited by Gould, J.. in Ld. Raym., 491, the plaintiff sued the defendant for making obstruction across a highway, in consequence of which the plaintiff's tenants left his houses, and he thereby lost the profits of them. It was objected for the defendant that the damage was not special enough, but the court was of a different opinion.

The case of *Ireson* v. *Moore* (1 Ld. Raym., 495), is

spoken of in *Fritz* v. *Hobson*, L. R., 14 Chy. Div., 542, as a case of great authority, and is said to be reported in numerous books, and is cited in Comyn's Digest, 5th Ed. Vol. 1, p. 279. It was this: "If A has a colliery, and B stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." See also *Cook* v. *Mayor*, L. R., 6 Eq., 176.

The American cases are equally as explicit and strong to sustain our contention.

In the case of *Stetson* v. *Flaxson*, 19 Pick., 147, spoken of frequently as the leading case, was where the defendant, having erected a ware-house projecting several feet into the street and beyond the plaintiff's ware-house, standing near the line of the street, whereby the plaintiff's ware-house was obstructed from the view of passengers, and travel was directed to a distance from it, and in consequence it was rendered less eligible as a place of business, and the plaintiff was obliged to reduce the rent, it was held that the plaintiff had suffered a special damage from the public nuisance, which entitled him to an action against the defendant. In regard to the necessity of an averment of special damage, Putnam, J., in delivering the opinion of the court, says (p. 161): "The citizens of Boston who want a mere right of passage from Market Square to the sea, may pass through North Market street, as well as they could through the old way which was obstructed. *They have no lands or ware-houses to be destroyed or greatly injured; they have no loss of rents from the desertion of tenants.* They at most are obliged to travel in a new street near to the old one, and probably do not desire to have the old one reopened; at most, they could complain only of what is technically a common nuisance, by which they experience only an inconvenience common to all citizens. But what to them, is at most, a mere common inconvenience, is a thing which, *in respect to the plaintiff, essentially impairs the value of his estate.*"

The case of *Rigney* v. *City of Chicago*, 102 Ill., 64, was an action on the case instituted by appellant against appellee for the purpose of recovering damages alleged to have been sustained by the appellant by reason of the construction, by the city, of a viaduct or bridge along Halsted and across Kinzie streets at their intersection some two hundred and twenty feet west of the appellants' premises, fronting on Kenzie street, which cut off all communication with Halstead street, by way of Kenzie street, except by means of a pair of stairs at the intersection of these streets. It was held, that the city was liable to the appellant in damages for the injury.

Mr. Chief Justice Dickey, in delivering his opinion, said: "It is not every change of grade made in a street which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in the street, as it may reasonably be supposed, might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. The making of such change is, therefore, no invasion of his right in that regard. But it cannot be assumed that the purchaser gave assent to sudden and extraordinary changes in the grade of a public highway, such as it is unreasonable to suppose a purchaser at the time of the original sale, or when he made improvements, would naturally anticipate might be required for the improvement of the public highway. To make such changes is an invasion of the right of the lot owner is the exercise of a power beyond this right in the nature of an easement spoken of, *and if the value of the property is really and in fact impaired thereby, in such case the injury to the lot owner is, in my judgment, a damage, which under our constitution, must be compensated.*

"The improvement in the case at bar is, in my judgment, one of those extraordinary changes which cannot be lawfully made without just compensation to those who

suffer damage by reason of the structure. *The right of action does not depend upon the distance between the lot and the improvement. This depends upon the nature and character of the improvement and upon the question whether the property of the claimant is materially damaged in fact.*" This case has been since approved in *City of Joilet* v. *Blower*, 155, Ill., 416, and by this honorable court in *Chicago* v. *Taylor*, 125 U. S., at page 168, where its doctrine is recognized as correct.

In the case of *Sheedy* v. *Union Press Brick Works*, 25 Mo. App., 527, the plaintiff was the owner of a lot fronting westwardly on Grove street, in the city of St. Louis; the defendant was a corporation, engaged in the manufacture of brick, and its property lay immediately to the south of and adjoining the lot of the plaintiff; upon its property the defendant had erected its works. Prior to the commencement of the action, the defendant had erected and maintained a shed for its purposes, which did not stop at the eastern margin of Grove street, but was extended entirely across that street, so as to totally obstruct any egress for wheeled vehicles southward from the plaintiff's lot on that street, though the evidence tended to show that there was a foot way through the shed to the south. Grove street had been platted and dedicated to the public as far south as Witzer street.

The petition of the plaintiff contained two counts; the first demands damages for casting rain-water from the defendant's sheds upon his land; the second demands special damages for the injury he has sustained from the act of the defendant in obstructing Grove street to the south of the plaintiff's property. Thompson, J., delivering the opinion of the court, says:

"The second count states a good cause of action. A land owner, having a right of egress in a given direction, by way of a public street, may have an injunction to restrain the closing of the street, on the theory that, by being driven to take a circuitous route to reach a place or

object in that direction, he suffered what the law terms special damage.

"If he may have an injunction to restrain such an injury when threatened merely, he may, by parity of reasoning, maintain an action for special damages in consequence of the injury after it has been committed."

But because the plaintiff offered no evidence tending to show that his property had been depreciated in value by this obstruction, the judgment of the lower court was reversed and the cause remanded. See to same effect *Cummings* v. *St. Louis*, 90 Mo., 259.

In the State of Indiana, though, from some loose expressions found in some of the decisions, it would appear, that a different rule prevails, the doctrine is the same as in Illinois, as appears from the latest deliverance of the Supreme Court of that State. The first of these is *Penn. Co.* vs. *Stanley*, 10 Ind. Ap., 421, 425, (decided in April, 1894,) where it was held that where a railroad company so changed its grade as to cut off one entrance to an alley, which afforded one of the means of egress from and access to lots abutting on such alley, and thereby caused material diminution in the value of the lots, the lot owner could recover for such damage, even though the company was authorized to change the grade of a highway at a crossing of its road.

Gavin, J., in delivering the opinion, says: "We have here a lot, or several lots, one of the ordinary means of access to which was by the alley in question. This alley the appellant closed at one end, so as to cut off the entrance to it at that point, and thus the case presents a physical disturbance of the right to use the alley. This act necessarily and directly materially interfered with ordinary and usual means of access to the lots.

It is a matter of general knowledge that the alleys in the rear of town or city lots are usual means of reaching the lots for many purposes, and they ordinarily add to the value and convenience of the property. In this instance,

both the allegations and proof show a material diminution in the value of the lots by reason of the obstruction. *In order to authorize a recovery by the appellee, it is not necessary that the obstruction should have been immediately in front of or touching upon his real estate.*"

The other case is *Dantzer* v. *Ind. U. Railway Company*, 141 Ind., 604, (decided in December, 1894.) There the appellant claimed damages for the vacating of a part of a highway and a point two streets distance from his property; to which, even after such vacation of the said highway, he had access from streets both north and south of him—(his lot fronting east). The court, while affirming the judgment of the Circuit Court in favor of the appellee, used this language, directly applicable to the case which your petitioner presents. Hachnet, J., (p. 608):

"We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the part of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lot owner is invaded and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, *access would be denied to the lot owner, though the street in front of his lot had upon it no obstruction.* The property rights of the lot owner, as against the public, are coterminus with the lines of his lot, but that property right may be obstructed, and its use defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy. This conclusion is held in the case of *Pennsylvania Co.* v. *Stanley*, (Ind. App.), 10 Ind. Ap., 421, where the remote obstruction of an alley created a *cul de sac*, which it was necessary to enter to gain access to the plaintiff's abutting lot, but from which there was no exit."

In this case the obstruction was not on the same square with plaintiff's lot, so that he had access from each direction—was not placed in a *cul de sac*. It was therefore held that the complaint was *damnum absque injuria*.

In the case of *Eachus* v. *Los Angeles, etc., Ry. Co.*, 103 Cal., 614–617, Harrison, J., says: "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation, and any act by which this right is impaired is, to that extent, a damage to his property. When a city sub-divides a tract of land of which it is the owner into blocks and streets and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of these lots acquires an easement in the street fronting upon his lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which the easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the lot itself within the meaning of the constitutional provision for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally."

The Supreme Court of Kentucky, in the case of *Railroad* v. *Applegate*, 8 Dona., 310, in a single sentence punctures the question to the quick and solves all doubt as to the law in that State, when it asserts that "if it should appear that such use was being made of a street as encroaches on any private right or *obstructs the reasonable use and enjoyment of the street* by any person who has an equal right to use it, we shall be ready to enjoin all such wrongful appropriation of the highway." See also *Bannon* v. *Murphy*, 38 N. W., 889.

And the cases all hold that where an injunction will lie to restrain such injury, an action will lie for special damages, special injury in equity as well as law being a necessary element.

It now becomes necessary to enquire into the real nature of the ordinance (found on page 17 of record) allowing Eighth street to be obstructed.

By the title of the ordinance, it at once appears that the closing of the street is authorized to be done by the Richmond and Alleghany Railroad Company, and by the first section it is provided that Eighth street, for a distance of about sixty feet next to Canal, should be closed, but, looking to the whole ordinance, all of which must be read to understand its scope, its real object appears, which was nothing more nor less than a covert effort to divert a *public street to a private use.* Fearing the discovery of the real purpose in view, and the resting of some such liability on the city as is here asserted, the Council provided, in section 4, that the Richmond & Alleghany Railroad Company should save the city harmless from all injuries or damages arising by reason of the exercise of the privileges granted said company, and obligated itself (the company) to pay to the city any amounts recovered against it on account of such injuries.

So far from the city having such power as is here attempted to exercise, it was, by its charter, *charged with the duty of preventing "the encumbering of streets, avenues, walks, public squares, lanes, alleys, bridges in ang manner whatever,"* (Sec. 19, Sub-div. VIII) and by sub-division VII, "to prevent or remove any structure, obstruction or encroachment over or under or in a street or alley." While by the same sub-division, the Council could "close or extend, widen or narrow, lay out and graduate, pave and otherwise *improve streets and public alleys* in the city;" yet these powers were to be exercised for the *public good*—not for the advantage of persons or corporations, and also subject to section 22 of the charter hereinafter quoted, and the like constitutional limitations, that private property was not to be taken for public use without just compensation.

Mr. Elliott, in his work on Roads and Streets, says:

"Public highways belong from side to side and end to end, to the public, and any permanent structure, or purpresture which materially encroaches upon a public street and impedes travel, is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public. For it is well settled that 'the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it, not in the actual use of some other traveler,' and if this be true, it necessarily follows that there can be no rightful, permanent use of the way for private purposes."

In the case of *Green* v. *Numenacher* 36 Wis., 50, 56, Cole J., said: "It is further objected that the nuisance complained of is a common nuisance, and that the remedy for its abatement is by indictment or information by the State and not by private action brought by an individual. The law is, doubtless, well settled, that an action will not lie by an individual for the abatement of a common nuisance, unless special damage is alleged and proven by the party bringing such action. But when the aggrieved party suffers actual damage, which is peculiar to himself, and not such as he suffers in common with the public at large, then the law gives him a right of action for his own and particular injury. This rule is believed to be so elementary as to require no argument nor the citation of authorities in its support."

In the case of *Francis* v. *Shœll*, 53 N. Y., 152, Grove J., said: "The rule is, that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is common to the entire community, yet he is liable at the suit of one who has sustained damage peculiar to himself."

In *Lansing* v. *Smith*, 4 Wend., 25, the court said: "The opinion I have found on this point is that every individual who receives actual damages from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation."

In *Sheppard* v. *Barnett*, 52 Tex. 638, the petition showed a nuisance in obstruction of the highway, and it was held that the plaintiff had suffered special damages therein different from that which is common to the public.

Mr. Elliott cites many cases to sustain this view, and sums up the doctrine as follows: "As a general rule no person can maintain an action for damages from a common nuisance where the injury and damages are common to all. But if a person sustains a special damage peculiar to himself from the obstruction of a highway, whether it be to his person or his property, he may maintain an action therefor. Thus, obstructing and cutting off access to a person's place of business is a special injury for which he may recover damages in action at law."

(Elliott on Roads and Streets, p. 500-501.)

The argument to show that the damage complained of in the declaration was peculiar to the plaintiff need not be repeated. The court will remember the charges in the declaration, and is asked to consider them in connection with the following pertinent quotation of a distinguished law writer:

"Thus, in the case of an injury from the erection of a building in a highway, a declaration simply alleging that the defendant had erected a building in a highway, whereby the defendant was prevented from passing with his horses and carriages or on foot, would be insufficient, for all the public are equally prevented from passing, and no recovery can be had for the common injury; but, if by reason of the obstruction, the plaintiff is prevented from reaching his premises, or if access thereto is cut off or made difficult, or if customers are prevented from coming to his shop to trade or to his inn for refreshments; or if he is compelled to take a more circuitous route to reach his destination, and thereby sustains material damage, as by the loss of time, or being subjected to loss in the sale of his goods, or in being prevented from performing a contract or discharging a legal duty, the special injury should be spe-

cifically and clearly set forth in the declaration, and must, in the main, be established by proof on the trial or no recovery can be had. In an action arising from a public nuisance, the gravamen of the action is the special damage; but, in the case of a private nuisance purely, the fact of the nuisance appearing, all damages that are the natural and probable consequence thereof to a particular right can be reviewed, whether specially alleged in the declaration or not." Wood on Nuisances, § 830, p. 873. See *Brown* v. *Watson*, 103 Miss., 161; 6 Johnson Chy., 439.

In the case of *Bently* v. *City of Atlanta*, 92 Ga., 623, "the plaintiff had leased a house and lot in the city of Atlanta. Near to and adjoining the street upon which his lot abutted there was a bridge over the tracks of a railroad company, which, prior to January 2, 1892, was a safe and convenient highway. But some time in January the city wrongfully permitted the railroad to raise the bridge in the middle thereof five feet. This raising of the grade rendered passage over the bridge both difficult and dangerous; and for loaded wagons and other vehicles, it was almost impassable; travel was diverted, in consequence of which the plaintiff claimed special and peculiar damage. Simmons, J., in delivering the opinion of the court, said: "The duty, both with respect to the general public and the occupants of premises along the streets of a city, of keeping the streets free from permanent or long-continued nuisances, rests primarily on the municipal government; and this duty cannot be evaded by urging the right and duty of a railway company to bridge its line at street crossing, and maintain the bridges and crossings in proper condition. If the city authorities suffer a railway company to erect a bridge at a street crossing, and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences, just as it would be if the improper work had been done by the city itself."

But, suppose for the sake of the argument, that the

railroad company was authorized by legislative grant to close and obstruct Eighth street, yet, on well understood principles, that would not exempt it from liability to private citizens for damages occasioned thereby. This court has spoken very clearly on this subject in the great case *Balt. & Pot. R. R. Co.* v. *Fifth B. Ch.*, 108 U. S.. 317, 331. It was there said:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria.* The private inconvenience in such case must be suffered for the public accommodation.

"But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals, acting without such authority, would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify

acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

This citation, from this able and unanimous opinion, as well as others which might be made, shows that the line of demarkation, between the direct taking and appropriation of private property and its indirect taking by the destruction of its value, cannot be traced, or if it can be, it is of no sort of importance to do so. Both alike are under the band of the constitutional inhibition.

A quotation from the case of *Mahon* v. *N. Y. Central R. R. Co.*, 24 N. Y., 660, shows how the two conditions over-lap, and fortify and protect the rights of the citizen so fortuitously guaranteed by the Constitution.

"To construct a railroad in a public highway, without compensation to the adjoining owner, is the taking of private property for public use without lawful authority, and constitutes a nuisance—a perpetual nuisance—and every day's continuance of it is a legal wrong." See also *Keley* v. *Kansas City*, 69 Mo., 109; *Fortwoot* v. *Crawford*, 8 A. & E. Cor. Cases, 406; and *Strange* v. *Dubuque*, 62 Ia., 303.

The practical effect of the ordinance was to make Eighth street from Cary south to the obstruction (on which plaintiff's lot abutted), a mere *cul de sac*. If it was legal to close Eighth street at its entrance into Canal, it was

equally legal to close it at its entrance into Cary, and thus deprive your petitioner of all access to his property, for there is no alley in the rear of his lot through which he could "eke out an inconvenient access with the outside world." Surely there was special injury to every one abutting on the *cul de sac* not common to others—the public in general.

It is pertinently said in *Johnston* v. *Old Colony R. R. Co.*, 28 R. I., 642, by the Supreme Court of Rhode Island, speaking on this exact point: "If a railroad can block up one side without liability for damage, why cannot another railroad block up the other side with equal exemption from liability, and thus leave a man's estate bottled or bagged up without paying damages? There can be no doubt that this lopping off of the approach to one's estate takes value from it; in fact, such approach is the very key of its value. If one pays his money directly for such approaches, as he does when he buys on a plat that he relies on, to be travelled over and make his estate central, why should a railroad appropriate such approaches and deprive him of the right of its becoming central without also paying for it? It is practically robbing one to enrich another, for, though a railroad corporation, so far as to entitle it to the right of eminent domain in its behalf, the shareholders are individuals, who are enriched by every such favor granted to it. It is common knowledge that the more centrally located an estate is the more value it is, and that ordinarily when an estate is removed by one single act and in a single day off of a much travelled way, and isolated and cooped up in a mere *cul de sac*, more or less value is thereby taken out of it. *Such damage in such a case as the one at bar does not seem to us indirect or remote, but direct and proximate. It is difficult to conceive what constitutes injury to an estate if lopping off its approaches which one has bought does not.*"

The italics are ours, and seem specially appropriate to this case.

In the court below, it was urged with earnestness that the cases relied on by the plaintiff in error and cited above, were largely, if not wholly, rendered in States where the constitutional inhibition was against the taking *or damaging* of private property without compensation.

We submit that the great and inalienable right of the citizen first secured by the Great Charter and now guaranteed in the Federal Constitution and in all the Constitutions of the States, is not to be "cabined, cribbed, confined, bound in to saucy doubts and fears" of its sufficiency to meet a case like this, because forsooth a few of the States have seen fit to head-off a disposition in some courts to curtail the scope of this beneficent provision. Surely this is no reason why other courts in other States should retrace their steps in the more beneficent construction wisely given this provision, but on the contrary these emendations show the true construction of the instrument.

But we are not left to mere argument as to the scope of this provision, as it stands in the Federal Constitution, and the Constitution of Virginia, for this court, in the oft-quoted case of *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 177, has used this language:

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the goverment had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, and placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy

its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a constuction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

* * * * * * *

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

We very reasonably claim the same benefit in the case at bar, in view of the ruling of the Supreme Court of Appeals of Virginia, as this court accorded in that case in view of the ruling of the highest court of Wisconsin. In Virginia the principle set forth in the foregoing quotation has been expresely approved. See *Williams* v. *West. U. Tel. Co.*, 86 Va. 696, 704, and *Hodges* v. *S. & R. R. R. Co.*, 88 Va. 653, 654; *Indianapolis* v. *Hartley*, 67 Ill., 43; *Georgia* v. *Railroad*, 125 W. R., 259.

It is clear that the defendant in error cannot claim the exemption from liability recognized in *Transportation Co.* v. *Chicago*, 99 U. S. 635, for there the damage was occasioned by the act of the city in *improving its streets for public use*. That case and this are as far apart as the east from the west.

As the city cannot make improvement in *opening streets* without due regard to the constitutional requirement to make compensation for private property taken for

the purpose, so it cannot *close streets*, even with that end in view, without a similar responsibility. Much more, however, is the city responsible when it can be seen, as in this case, that the real object is to bestow a special privilege on a corporation at the expense of the public, resulting in special damage to private individuals.

On this precise point, we beg to call the court's attention to the language of the Supreme Court of Missouri in the case of *The Belcher S. Ref. Co.* v. *S. Louis G. Elev. Co.*, 82 Mo., 121, 127, where the city undertook to divert a public wharf (so by condemnation) to the use of a corporation for a period of twenty years. It was there said: "The city has no right, and can acquire none from the legislature to make such a disposition of the property condemned for wharf purposes as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect. Laws which authorize the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights but an imperative public necessity and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds prescribed by the Constitution and the law.

It would not do to permit property condemned for one purpose to be used for another and different purpose, or property condemned for public use to be appropriated to private use. The latter can no more be done than could the property, in the first instance, have been condemned for such use. The authorities which support the foregoing propositions of law are numerous, but we will content ourselves with the citation of the following:

Imlay v. *Union Br. R. R. Co.*, 26 Conn., 255; *Williams* v. *Natural Bridge Plank Road Co.*, 21 Mo., 582; *Rutherford* v. *Taylor*, 38 Mo., 315; *Price* v. *Thompson*, 48 Mo., 363; *Ill. etc., Canal Co.* v. *St. Louis*, 2 Dillon, C. C., 82; *Pres. Society* v. *Auburn, etc., R. R. Co.*, 3

Hill 567; *Trenor* v. *Jackson*, 46 How., Pr. R., 397; *Louisville* v. *Louisville Rolling Mill Co.*, 3 Bush., 416; *Barclay* v. *Howell's Lessee*, 6 Pet., 498; *State* v. *Laverack*, 34 N. J. L., 202; *Warren* v. *Lyons City*, 22 Iowa, 357; *Board Education* v. *Edson*, 18 Ohio St., 225; *Barney* v. *Keokuk*, 94 S., 324."

At common law, depreciation of property by agencies that destroy its value, would undoubtedly be a ground for the recovery of damages. The maxim *sic utere tuo ut alienum non leadas*, embodies this duty that each owes the other. The law must enforce it, or the maxim would be idle. *West, A. R. Ry. Co.* v. *Hill*, 56 Penn. St., 460. Its application was made by the highest court in Virginia, in *R., F. & P. R. R. Co.* v. *City of Richmond*, 26 Gratt., 83, and on appeal, was affirmed in the Supreme Court, 96 U. S., 521.

But the Legislature did not leave this obligation to be discovered in the common law alone, for by section 22 of the charter of the city of Richmond, it is provided:

"22. The Council shall not take or use any private property for streets or other public purpose, without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law."

It is an elementary principle that action for a trespass may be brought either against the hand actually committing the injury, or against the person or corporation by whose order or authority the act is done. (Addison on Torts, sec. 422). From which it follows, that both, as well as either, joint tort-feasor may be sued in the same action,

and to show liability on either, will entitle the plaintiff to recover against the one shown to be at fault. *Davis* v. *Franck*, 33 Gratt., 413.

In *Chalkley* v. *City of Richmond*, 88 Va., 402, it was said:

"The city of Richmond cannot escape liability for the damages done to the rights of property, health and comfort of the plaintiff, by the alteration made in the sewer by Stokes & Co., by permission of the city under the supervision of its agents and by its money aid. A person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole same as though he had done all without help."

For these reasons we submit that the judgment of the court below should be reversed, the demurrer to the declation overruled and the case remanded for trial.

HENRY R. POLLARD.

Reply Brief for Plaintiff in Error.

In the Supreme Court of the United States.

No. 291.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

versus

THE CITY OF RICHMOND AND THE CHESAPEAKE & OHIO RAILWAY COMPANY,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

On behalf of the Plaintiff in Error, we beg to submit in reply to brief for defendants in error, the following:

FIRST. It cannot be true as contended that, in order to raise a Federal question, and thus secure jurisdiction here, the declaration should have alleged in terms the deprivation of the constitutional right now contended for.

In the multitude of cases in which this Court has had under review the question of jurisdiction, not a single case is cited, nor can one be cited, where it has been held that the plaintiff's bill or declaration must set forth as a

ground of relief the fact that he has been deprived of his property without compensation or without due process of law. The cases all say, as Mr. Justice Harlan said in *Railway Co.* vs. *Chicago*, 166 U. S., 226, 231: "It is sufficient if it appears from the record that such right was specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

The declaration made the ordinance of the city, which deprived the plaintiff of his property, a part of it, so that the court could see for itself that no provision for compensation or for process before it did the act complained as a deprivation of his property. Whether such ordinance was amenable to the fourteenth amendment was a *conclusion of law*, and one of the cardinal, and even elementary, rules of pleading is that conclusions of law need never be pleaded.

The statement *ad arguendum* in the brief that the motion made on January 31st, relied on to give jusisdiction, "was an afterthought" is without the slightest foundation. Is it not more reasonable to presume that two motions to set aside the judgment were made, (one on the usual and general ground that it was contrary to the law and the evidence, and the other "solely on the ground that the Act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city of Richmond, so far as it authorised the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void because in conflict with the fourteenth amendment of the Constitution of the United States. Rocord p. 21), in order more pointedly to present the constitutional question? Not only did the trial Court pass on this last motion, but one of the errors assigned in the petition for appeal, presented to the Court of Appeals, expressly set out this ruling of the trial Court as error, for which its judgment should be reversed. See Record p. 8, 9.

The declaration, after alleging the ownership of the lot described, alleged that the defendants did, under the au-

thority of an ordinance, unlawfully close Eighth Street, and did unjustly and unlawfully allow the Richmond and Alleghany Railroad Company, of which the Chesapeake and Ohio Railway Company was the successor, to erect sheds and fences across said street, which obstructed the free use of the same as a highway, whereby the plaintiff was greatly damaged in having his property depreciated in value. The only answer to these damaging charges was a demurrer to the declaration, which of necessity presented the question whether the ordinance was a lawful and constitutional exercise of the powers vested in the Council, viz: whether such an ordinance which closed a street was valid without proper provision for process against the persons specially injured by the proposed act, and also without proving compensation for damages, etc.

There is excellent authority for the proposition that the construction of a railroad in a public street, without providing compensation to the persons injured thereby, is *ipso facto* the taking of private property for public use. *Mahon* vs. *N. Y. C. R. R. Co.*, 24 N. Y., 660; *Keley* vs. *Kansas City*, 69 Mo.; *Fortwood* vs. *Crawford*, 8 A. and E. Cor. Cases, 406; and *Strange* vs. *Dubuque*, 62 Ia., 303.

And this Court in *Balto. & Pot. R. R. Co.* vs. *Fifth St. Bap. Ch.*, 108 U. S., 317, 331, said:

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

SECOND. The cases relied on to show that the presentation of the Federal question came too late in this case do not sustain the contention of counsel.

Bushnell vs. *C. M. & S. Co.*, 148 U. S., 682 holds that

"A Federal question suggested for the first time in a petition for a rehearing, after judgment in the highest court of a State, is not properly raised so as to authorize this court to review the decision of that court." To the same effect, exactly, is the case of *Butler* vs. *Gage*, 138 U. S., 52.

While the case of *Loeber* vs. *Schroeder*, 148 U. S., 580, held that after the case had been once appealed to the State court of Appeals and sent back to the lower court and there again decided, it was then too late to present a Federal question. There is surely no analogy in these cases to the one at the bar.

Nor are counsel any more fortunate in citing the recent case of *Kipley* vs. *Illinois*, 170 U. S., 182, for there the determination of the court denying the jurisdiction rests upon the fact that the motion to amend the answer was not placed upon the ground that a Federal question was thereby sought to be set up; and even, if such was the intention of counsel, the record did not show that the ruling of the court in denying the amendment was excepted to. Here the record shows that the motion was made *solely* on the ground of the denial of Federal rights and the denial of the motion was excepted to and the ground for the motion and the reason for the exception are set out both in the order of the court and the bill of exception. Record pp. 20–21.

THIRD. It is not contended by the counsel for the plaintiff in error, as counsel for defendants in error seem to think, that there can be any recovery here for damage done by closing the street, if the city was acting "within the scope of its powers," and exercising such powers in a constitutional way.

The gravamen of the plaintiff's case was that the council of the city in passing the ordinance had transcended its authority, and had undertaken to appropriate private property without due process of law, or compensation for those damaged.

We nave no complaint against the Virginia cases cited

by the learned counsel (*Smith* vs. *Alexandria, Kehrew* v. *Richmond* and *H. B. & C. Co.* vs. *Roanoke*), for they are in no wise in conflict with our contention, for in all of these cases, and many others of the like kind, the municipal corporation was held not liable, because, in the act complained of, the city was *improving the streets, not devoting them to the exclusive use of a private corporation as in this case, and thereby depriving the public of their use and by that act injuring in a special way the plaintiff.*

Nor do we challenge the proposition stated on page 17 of the brief. that "A municipal corporation, if the authorisy is given it by the Legislature, has a right to make any use of a street which it may see fit, and the damage will be *damnum absque injuria*, so far as the lot-owner is concerned, *provided no one of the rights peculiar to him as the owner of the lot is taken away.*" Our contention was and is that our client was within the saving of the proviso, for the injury described in his declaration is peculiar to him and that any enactment, ordinance or law that deprived him of his right, or of an opportunity to establish such right, is void because unconstitutional.

But we do challenge the proposition, also contended for, certainly in the narrow sense in which counsel applies it, that all damages, in order to be recognized as *special*, must be directly traceable to the deprivation of one of three things, viz: *light, air or access.*

A practical illustration reduces this narrow view to an absudity. Let it be thus illustrated: The planting of so harmless an obstruction as a sign post in the street by a private corporation under authority of the city, which encroached one inch in front of another's lot would be, it is admitted by opposing counsel, a ground for suit, because there would be special damage, but the erection of an impassable barrier across a street only one inch away from a person's line, whereby public travel along a street was diverted and store property isolated, would not occasion spe-

cial damage though the value of such person's lot was thereby practically destroyed.

We cannot accept so irrational and illogical a conclusion, or believe that this court will recognise it. The courts in England, where the proposition was once accepted, have long ago repudiated it. See cases cited in opening brief, pp. 17-18.

It is true that some of the ablest courts in this country have undertaken to draw a hard and fast line in order to determine this question, but others equally able have taken the other view. The cases favorable to our view are cited and commented upon in our opening brief, and we need not here repeat these citations.

This court has but recently held that in estimating damages in condemnation proceedings, "the *profitableness* of the business was undoubtedly a matter to be considered." *A. Bachus, Jr.*, vs. *Fort Street U. Depot Co.*, 169 U. S., 557, 574.

Is it not paradoxical to say that such damages as "profitableness" of a business conducted on a lot located near to property taken, may be considered in condemnation proceedings, and yet the "profitableness" of a business may be injured without redress, in cases where the legislative agencies have failed or refused to provide process or proceedings necessary to secure compensation?

On this precise point, we beg to call the attention of the court to the charge in the plaintiff's declaration. It is there alleged that "the plaintiff, his tenants, agents, servants, and all others, on foot, in carriages, wagons, and other vehicles, had free access and approach to said messuage and premises from the direction of Canal street and so back again at all times of the year at their will and pleasure, yet the said defendants, well knowing the premises, to-wit: on the day and year aforesaid, wrongfully and unjustly placed divers fences and other structures across the said highway known as Eighth street at a point, to-wit: two hundred and fifty-one feet south of Cary street and —

feet north of the face of the north wall of the old canal, which fences and other said structures obstructed and closed the said highway and prevented the plaintiff, his tenants, agents, servants, and others, from having the free use of said highway as he and they might otherwise have had, and by means of the premises the plaintiff has also from thence hitherto been deprived of the use of his said store and dwelling upon said messuage and of large gains, profits, benefits, and advantages in the way of rent which he might and otherwise would have acquired from the said stores and dwellings, to-wit: of the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is greatly diminished to a great extent, to-wit: to the sum of two thousand dollars, and whereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use, and enjoyment of said messuage and premises, and has been and still is by means of the premises otherwise greatly injured and damnified."

FOURTH. In reply to the contention made by the learned counsel on the other side that the absence from the Virginia Constitution of the word "damaged" makes a world of difference in the determination of this case, we wish to remark (1) that the plaintiff in this honorable court is insisting on an infraction of his constitutional rights under the Federal Constitution and not under the State Constitution, and (2) that this court has settled once for all in the great case of *Pumpelley* vs. *Green Bay Company*, 13 Wall. 166, 179, *that the serious interruption to the common and necessary use of property is equivalent to the taking of it*, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. In that case, great and far-reaching principles were discussed and settled by a great and broad-minded judge. It is a wonder that the learned counsel should have attempted to resurrect the argument buried, as it was, under the weighty words of one of the three greatest of the great de-

parted judges of this, the greatest of courts. Mr. Justice Miller thus consigned the argument to oblivion :

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, and placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

But grant that the city is "charged with the duty of closing streets," just as much as it is charged with the duty of "opening streets." Yet it will not be contended that it could legally pass an ordinance opening a street without providing process against, and compensation to the persons whose property would be taken. So it cannot close a street without like provision to protect persons whose property is taken in the constitutional sense, that is damage; for it is undoubtedly the law of the land, and specially of the State of Virginia, that "once a highway always a highway," and not even the Legislature can take away the right of access to and user of without compensation. Elliott on Roads and Streets, sec. 658; *Taylor's Case*, 29 Gratt., 793; *Bunting* vs *Danville*, 92 Va., 200.

Said the Court of Appeals of New York, discussing the property rights of persons in the highway: "Any law which destroys property, or its value, or takes away any of its essential attributes, deprives the owner of his property," *Lohr* vs. *Mt. Eler R. Co.*, 101 N. Y,, 286.

FIFTH. While it is true that we fell into error in describing the exact location of the lot of this plaintiff, yet it is equally true that this is but a test case, for there are three other suitors whose properties are likewise located on the same square—namely: James Marano, Dr. H. Wythe Davis and A. Meyer, and the facts are substantially the same in all of the cases and the principles are identical, so that this suggestion of counsel can have no bearing upon the case.

In conclusion, we wish to say that while the city ef Richmond is nominally the defendant to this suit, yet it cannot be seriously affected by its determination for the ordinance allowing the closing of the street and the building of the obstruction therein protects its interest by the following provision:

"Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of any one being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injnries." Record, p. 18.

Respectfully submitted,

HENRY R. POLLARD.

No. 48.

Brief of Wickham for D. C.

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Supreme Court of the United States.

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OCTOBER TERM, 1898.

NO.— 48

ENGELBERT MEYER, Plaintiff in Error,

VS.

THE CITY OF RICHMOND AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Brief for the Defendants in Error.

Supreme Court of the United States,

OCTOBER TERM, 1898.

NO. ——

ENGELBERT MEYER, PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR THE DEFENDANTS IN ERROR.

The city of Richmond is a municipal corporation duly incorporated under the laws of the State of Virginia. The charter of the said city will be found in the Acts of the General Assembly 1869–70, page 120, and the provisions of the charter of said city, so far as applicable to this case, are as follows:

Section 19, chapter 3, pages 123–4, provides that the council of the said city "shall likewise have power to make

such ordinances by laws and regulations as they may deem advisable to carry out the following powers which are hereby vested in them" and among the powers vested in said council in clause 7, page 124, is the power to "close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city * * * * they may build bridges in and culverts under said streets * * * *." Section 22, chapter 3, pages 127–8 provides that "the council shall not take or use any private property for streets or other public purposes without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law." The general law of the State of Virginia in regard to the condemnation of property will be found in the Code of Virginia 1887, sections 1074 to 1084 inclusive, and said law has the provisions usual in such cases, viz: notice to the party whose land is to be condemned, appointment by the court of commissioners, who, after taking the prescribed oath, go upon the land and view the same; hear what evidence may be adduced, and make a return of their report in writing, under oath, to the court, on which the court hears the parties and gives judgment thereon as may appear right. These provisions of the general law form a part of every charter which carries with it the right of eminent domain. (See appendix).

The Chesapeake & Ohio Railway Company is the successor of the Richmond and Alleghany Railroad Company.

Eighth street is a street in the city of Richmond, and *begins* at Canal street and runs northwardly. Canal street runs

east and west, Seventh and Ninth streets are streets west and east, respectively, of Eight street and parallel thereto, and distant one square therefrom. Cary street is parallel to Canal street, and distant one square therefrom.

As appears from the declaration and plat therewith, pages 23 to 28 and page 32, the plaintiff is the owner of a lot with improvements thereon, situate at the southwest corner of Eighth and Cary streets, and not about the centre of the square, as stated in brief of counsel for appellant on page 15 thereof. The l cation of the property is shown by the declaration. Record, pages 23 to 28.

On the 28th of June, 1886, the council of the city of Richmond passed the ordinance involved in this case, which will be found set out at pages 29 to 31 of the record. From this ordinance it will be seen that the city of Richmond closed to the public such portion of Eighth street as lies between the southern boundary lines of the right of way of the James River and Kanawha Company, and a line drawn across Eighth street at right angles, sixty feet north of the face of the north wall of the canal, as the same stood on the 28th day of June, 1886, from and after the 31st day of August, 1886, until said city should re-open the same. Said ordinance required a bridge to be erected by the Richmond and Alleghany Railroad Company over the closed portion of said street, and it appears from the declaration in the case that this has been done. It further appears upon an examination of the declaration that this is an ordinary action of tort for damages, because of a nuisance erected in a highway by the defendants, which nuisance prevented the plaintiffs from reaching Canal street by way of Eighth street and from entering Eighth street from Canal street, except when travelling on foot, in which case the bridge above referred to is used. There is no charge in the declaration that the charter of the city of Richmond, or the ordinance passed by the council of said city was violative of any constitutional right of

the plaintiff, nor is it anywhere charged that the plaintiff was deprived of his property thereby, without due process of law, but the charge is that the defendants violated the duty of keeping Eighth street free from obstructions and in consequence thereof the plaintiff has sustained damage in the diminished value of his property and in the convenient use of the same. The court will see from the declaration and plat therewith, that there is no interference with the portion of Eighth street contiguous to plaintiff's property and that the sole effect of the closing of the portion of Eighth street involved in this inquiry is that persons (not on foot) desiring to go from Eighth and Cary to Canal and Seventh or Canal and Ninth streets, travel the north and west sides of the square bounded by Cary, Eighth, Canal and Seventh streets, instead of the east and south sides, and those desiring to go from Eighth and Cary to Ninth and Canal streets, travel the north and east sides of the square bounded by Cary and Ninth, Canal and Eighth streets, instead of the west and south sides.

The constitution of Virginia, so far as involved in this controversy, provides in article 5, section 14, that the General Assembly shall not pass "any law whereby private property shall be taken for public uses without just compensation."

The foregoing are all of the facts and such of the laws of Virginia as are necessary to a correct understanding of the case which the court is now asked to consider.

Argument.

When a litigant comes to this court complaining that he has been deprived of some right guaranteed him by the constitution of the United States, the first question presented to this court is whether the case as made by him in the court below properly raised a constitutional question, and, if it did, then whether the court below decided the constitutional

question against the plaintiff in error or whether the decision rendered by the court was such as necessarily involved a decision of the constitutional question adversely to the plaintiff. It is not sufficient that the constitutional question was raised, it must also appear from the record either that it was decided or that the decision rendered was such as necessarily decided the constitutional question.

The common-law system of pleading is retained in Virginia and under that as well as under any other proper system the court must look to the pleadings to find the grounds of recovery and the defences relied on. The declaration is the pleading which sets out the plaintiff's case, and must contain all of the grounds relied on for the recovery, and none other than those so set out can be considered by the court. The sufficiency of the grounds set out in the declaration are challenged and put in issue by the demurrer, and thus the only points on which the judgment of the court could be asked, are raised. The declaration shows that no point is therein raised which demanded the consideration by the court of any constitutional question. It is not sufficient that the charter of the city of Richmond and the ordinance, are made a part of the declaration. If it were intended to raise the question that the charter and ordinance were unconstitutional and in consequence thereof plaintiff was deprived of his property without due process of law the same should have been specially set up or claimed by apt language in the declaration so as to bring the question to the attention of the court when it had to pass on the demurrer. No charge is made in the declaration that the charter of the city of Richmond is in any way unconstitutional and void, nor is it anywhere therein alleged or claimed directly or by reasonable inference that the plaintiff was in any way deprived of his property without due process of law, but on the contrary it would seem from the declaration that the charter of said city is relied on as giving to the plaintiff the right which he charges has been violated, viz: the right to have Eighth street

in its entire length kept open and suitable for all kinds of travel, forever. *Hoyt* vs. *Shelden*, 1 Black 518. The court will see from the record, page 33, that the demurrer in this case was sustained, and the suit dismissed by the order entered on December 27, 1895, but in consequence of the representation made to the court that it was the intention of the plaintiff (page 34) to apply for an appeal to the Supreme Court of Appeals of Virginia in the case of H. Wythe Davis against the city of Richmond and the Chesapeake and Ohio Railway Company (which was a case tried at the same time and similar to this case and argued and decided with this case) the court took time to consider the motion of the plaintiff to set aside the said judgment and enter judgment for him on the said demurrer, and retained this case to await the result of the Davis case. The appeal in the Davis case being refused by the Court of Appeals and thereby the judgment of the Law and Equity Court of the city of Richmond being affirmed, on the 31st day of January, 1896, the Law and Equity Court refused to set aside its order entered December 27, 1895, and thereupon the plaintiff again moved the court to set aside and annul said judgment on the sole ground that the Act of the General Assemby of Virginia, approved May 24, 1870, providing a charter for the city of Richmond, (Acts 1869-'70, page 120), so far as it authorized the passage of the ordinance, in the declaration mentioned as well as said ordinance, is unconstitutional and void because in conflict with the Fourteenth Amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law.

The case as made by the pleading and on which case alone the Law and Equity Court of the city of Richmond could pass, was a case in which the plaintiff relied on the charter to give him his right which he claimed was violated, how then was it possible in that state of the pleading to do aught but over-rule the motion, and in so doing no constitutional

question was passed on because no constitutional question had been properly made on the record, or in any other way, which no doubt was the reason of the lower court's judgment and that of the Supreme Court of Appeals of Virginia for sustaining the judgment of the lower court.

We have then the case of a plaintiff bringing an ordinary action of tort for damages to his property because of the breach of duty on the part of the defendant city in not keeping open a highway in accordance with its charter obligations; failing to sustain his case as made, and, after judgment against him on that case, moving to set said judgment aside, not because of any error in the judgment on the case as presented to the court, but solely on a ground, which to be considered by the court, would require it to decide a different case from that in the pleading before it. That no constitutional question was raised up to the entry of the order of December 27, 1895, is clear, else there would have been an appeal to this court in the H. Wythe Davis case; it is equally clear that the case as it then stood with no amendment or change in the pleading, could not be changed by the renewal of the motion to set aside the order of December 27, 1895, and enter judgment for the plaintiff on the demurrer because to do so would be to enter an order not warranted by the pleading in the case. The Court of Appeals of Virginia could only pass on the case decided by the lower court. It is equally clear that the motion to set aside the order of December 27, 1895, which was submitted on January 31, 1896, was an afterthought being in effect a motion to set the judgment aside in order to re-hear the case and under the circumstances such a motion should not stand in any better position than a petition for a re-hearing which, like a bill of review, rests on the sound discretion of the court, and it is well settled that "an attempt to raise, for the first time, a Federal question in a petition for re-hearing after judgment, comes too late."

Loeber vs. *Schroeder*, 149 U. S., page 580, see page 585 and cases cited.

It is clear that plaintiff's proper course if he wished to raise any such question as this was to have asked leave to amend his declaration which, at that stage of the case, is granted as a matter of course, and thus raised the constitutional question in the record. The reason given for a motion can never so change the case made by the pleadings as to require the court to consider and pass on a question so raised unless the pleading in the case was in such shape as to have properly submitted the question raised in the motion.

Grave and important constitutional questions cannot thus be raised and brought to this court and passed on, for to do so would put this court in the position of passing on questions never passed on or considered below.

Even if the court were to consider that the constitutional question was properly raised by the motion, the record does not show that it was passed on, nor was the judgment entered such that said question must have been necessarily decided adversely to the plaintiff in error, and such being the case, this court will not take jurisdiction. When the motion was made on January 31, 1896, the court had then to look to the pleading to see if any such question was fairly presented therein; not finding any such claim made in the declaration and having already decided the case as made, it declined to set aside its judgment, and in so doing, did not necessarily decide whether the charter of the city of Richmond and ordinance passed in pursuance thereof, was, or was not constitutional, but simply decided that such a question was not involved and had not been raised by the pleading. The court in the then condition of the record may well have over-ruled the motion for the reason that it could not entertain it with the pleadings in their then shape, and in so doing, passed on no constitutional question.

Steines vs. *Franklin County*, 14 Wall., 15.
Bolling vs. *Lersner*, 91 U. S., 594.
Brown vs. *Atwell*, 92 U. S, 327.

The case of *Railway Co* vs. *Chicago*, 166 U. S. 226, relied on by plaintiff in error to sustain the jurisdiction is not in conflict with the position of defendant in error. In the Chicago case it was the defendant in the court below who raised the constitutional question; under the statutory proceedings in that case there was no provision for an answer by the defendant and in view of the fact that there was no such provision, Mr. Justice Harlan held at page 231, "it is not *therefore* important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the constitution of the United States." Suppose there had been a provision for an answer and the defendant had filed its answer and had nowhere therein made the claim that the statute under which the proceedings were being had was unconstitutional or that it was being deprived of its property without due process of law, would this court have hesitated to say that, not having raised the constitutional question in its answer, it was too late to undertake, in a motion to set aside the verdict of the jury, to raise the constitutional question in the shape of a reason for setting aside the verdict? The defendant if it had such a question and relied on it would have been required to set it up in its answer and no answer being provided for it was not important that the defendant did not volunteer to file an answer and raise the question. The only way in which such question could have been raised in this Chicago case was by the motion to set aside the verdict of the jury and grant a new trial upon the grounds set forth, to-wit: that the several rulings of the court in excluding proper evidence for the defendant, the statute under which the condemnation proceedings were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment.

The case under argument stands on a very different footing. Here the plaintiff in the court below attempts to raise the constitutional question as a reason why the judgment of the court on the case made by the plaintiff should be set aside and a rehearing allowed, claiming that the charter of the city of Richmond and ordinance of the council passed in pursuance thereof, violated the constitution of the United States; whereas in plaintiff's case as made by his declaration he made no such charge, but relied on the charter as giving him his right, making no claim that it was unconstitutional, but claiming that the obligations imposed by the charter had been violated and thereby damage had resulted to him; but no claim of being deprived of property is made therein. Having failed to raise the constitutional question in his declaration and taken his chances on the case as made, and failed, it was too late for him to undertake to raise it in the shape of a reason for setting aside the judgment on a case made by him selfthat did not involve any constitutional question. *

There is an independent ground of general law on which the court could have decided this case, without passing on the constitutionality of the charter and ordinance of the city of Richmond. The constitution prohibits any State from depriving any person of his property without due process of law. A State law therefore to be in violation of this provison of the constitution must contain two essential requisites;

1st. Its provisions must in some way deprive a person of his property, and

2d. It must fail to provide due process of law.

If it does not deprive a person of his property, whether due process of law is provided or not, makes no difference, the law is constitutional. If it does deprive a person of his property, but provides due process of law, the law is constitutional. It was not necessary for the court to pass on the

* See Kipley vs Illinois 170 U.S. p 182

constitutionality of the charter and ordinance in this case, because on looking to the case in the declaration, the court saw that no question of depriving a person of his property did or could arise. The entire claim was for *damages*, because the plaintiff was *deprived*, not of any property, but of a right which he enjoyed with the community at large, and enjoyed at the will of the legislature, to continue or take away as it might see fit, with or without compensation for any damage he might suffer, according as the legislature might think best for the interests of the community. In its action, the legislature is not controlled by any provision of either the State or Federal Constitution, so long as it does not deprive any one of property. There is a clear and marked distinction between "depriving" of property and "damaging" property. There is no difference in the meaning of the words, "take a man's property" and "deprive a man of his property." Each of the two latter expressions necessarily imports a direct action on the thing constituting the property. The word "damage" is much wider in its scope and meaning, and damage to property may arise not only in consequence of direct action on the thing constituting property, but from a multitude of acts not directly affecting the thing constituting the property. The case set out in the declaration was damage to property, not deprivation of property, hence the decision of the case did not necessarily involve the consideration or decision of the constitutional question. The case made in the declaration was damages for the diminished value of the premises and less convenient use and enjoyment of the same, and independent of the ordinance and charter, presented the question whether or not this was such a case of special damage, as would entitle plaintiff to recover. This question the court could have decided, without reference to the charter or ordinance. It is not every unauthorized obstruction of a street that will entitle an individual to maintain an action for damages. He must set forth and claim what the law denominates special damages, or damages peculiar to him-

self, growing out of the obstruction. The court could have held that the damages set out in the declaration did not come under the head of special or peculiar damages, and in so doing, would have passed on no constitutional question, and, whether it erred or did not err on this question of general law, its decision is not subject to review by this court. That the court was correct in holding that no special or peculiar damage was set out, is supported by the following authorities:

Rude vs. *City of St. Louis*, 93 Mo. 408.
Barnum etc. vs. *Minnesota etc. R. Co.* 33 Minn. 365.
Bigley vs. *Nunan and al.*, 53 Cal. 403.

For the foregoing reasons this case should be dismissed for want of jurisdiction.

If the court should reach the consideration of this case on the merits, the sole question it will have to consider is whether the plaintiff in error has been deprived of his *property* without due process of law. Examination of the charter of the city of Richmond, section 22, in connection with sections 1074 to 1084 Code of Virginia 1887, above referred to (see appendix), will show that so far as the provisions of the law go they duly provided for due process of law before an individual can be deprived of his property. It is not claimed in this case that there has been any actual or physical taking or invasion of the property of the plaintiff. The damage charged is purely consequential, which is held both by the United States Supreme Court and by the Virginia Court of Appeals not to be a taking or deprivation within the meaning of the constitutional provisions either of the State or of the United States.

In the case of *Smith* vs. *City Council of Alexandria*, reported in 33 Gratt., page 208, the court held that the council of the city of Alexandria had full power to change the grade of the street, and that so long as the power was properly exercised,

any damage resulting from the change in the grade would be *damnum absque injuria*, and, quoting from Second Dillon on Municipal Corporations, sections 782, 783, says: "The courts by numerous decisions in most of the States have settled the doctrine that municipal corporations acting under authority conferred by the Legislature to make and repair, or to grade, level and improve streets, *if they exercise reasonable care and skill in the performance of the work resolved upon* are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation or in some statute creating the liability."

The case of *Kehrer* vs. *City of Richmond*, 81 Va., page 745, was a case where Kehrer alleged that by reason of the erection of a bank in the street in front of his premises he was greatly damaged and injured in the following particulars:

1. That the plaintiff was obliged to keep and maintain a barrier to prevent the falling of earth from the street upon his premises.

2. That ingress and egress to and from his premises was rendered inconvenient and unsafe.

3. That the value of his property had been diminished.

4. That his business had been diminished.

5. That the flow of rain-water upon his premises caused damage, etc.

On a demurrer to the declaration the court held that a municipal corporation acting within the scope of its power and with reasonable care and skill in the opening, grading and improving its streets, is not liable to the adjoining owners *whose lands are not actually taken*, for consequential damages to his premises, unless there is a provision in the charter

of the corporation or in some statute creating the liability. And the court further says that this is the universal doctrine, except, perhaps, in the State of Ohio, and it might also have added in the State of Kentucky. It is not perceived that there is any difference in principle, so far as consequential damages is concerned, between closing a street and building in the closed part a bridge, and the alteration of the grade by an embankment, etc., in the street. The court further held in this case, page 750, "the result is that the declaration before us is fatally defective; the property of the plaintiff has not been taken whenever his rights are not unlawfully invaded. And if, in consequence of the acts complained of, he has been obliged, as he avers, to erect a barrier for the protection of his property, or steps in order to have ingress and egress to and from his premises, or if his business has been injuriously affected and the value of his property diminished, it is mere incidental injury caused by the prosecution in a lawful manner of a public improvement, for which there is no redress." The same principles have been recently laid down in the case of the *Home Building and Conveyance Company against The City of Roanoke*, 91 Va., page 52.

In the case of *Transportation Company* vs. *Chicago*, 99 U.S., 635, Mr. Justice Strong, at page 641, says: "The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public, and improvements made by its directions, or by its authority, are its acts, and the ultimate responsibility, of course, should rest upon it. But it is a prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing, if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for the consequential injury resulting from the State's action, through its agents, if there be any, must be that, and that only, which the Legis-

lature shall give. It does not exist at common law. The decisions to which we have referred, were made in view of Magna Charta and the restrictions to be found in the constitution of every State that private property shall not be taken for public use without just compensation being made, * * * * but acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agent, or give him any right of action. This is supported by immense weight of authority. Those who are curious to see the decisions, will find them collected in Cooley on Constitutional Limitations, page 542, and notes."

The constitution of Virginia differs from the constitutions of some of the States, as for example the present constitution of Illinois. The former constitution of Illinois provided that private property should not be taken for public use without just compensation. The present constitution of Illinois provides that private property shall not be taken *or damaged* for public use, without just compensation, and the court will observe that very different results are reached according to the varying provisions of the constitutions and this is the qualification alluded to in the *Kehrer case*, above referred to, when the court uses the language "unless there is a provision in the charter of the corporation or in some statute creating the liability."

A comparison of the case of *Transportation Company* vs. *Chicago*, 99 U. S., page 635, with the case of *Chicago* vs. *Taylor*, 125 U. S, page 161, will illustrate the different results reached in consequence of the addition of the words "or damaged" which amendment to the constitution of Illinois was made subsequent to the time the Transportation case originated, but prior to the origin of the Taylor case.

It would thus seem that, under the decisions of this court, the plaintiff has not been deprived of his property, and therefore that he has no cause of complaint, but it is contended that while the plaintiff's property has not been actually taken, yet that it has been damaged by the invasion of his rights, viz; the right to use the closed portion of Eighth street as a highway and that this right is the property of the plaintiff in consequence of his ownership of a lot fronting on a portion of the street not closed, of which he cannot be deprived without due process of law.

The interest of a lot owner in a street is of a two-fold nature. First, the right of passage along the street which he enjoys in common with the rest of the public and, second, rights peculiar to and growing out of his ownership of the lot and its location on the street, viz; the rights of light, air and access. To prevent confusion it is well to understand what is meant by the words so often used in cases of this kind, viz; "abutting property owners" and the word "access." Wherever the words "abutting property owners" are used in the discussion of questions arising out of the closing of a street, the court will see that the meaning of the word "abutting" is abutting on the portion of the street that is closed and in the same connection where the court finds the word "access" used, it will see from the context that it means the passage from the street on to the property involved, and not passage along the street to the portion of the same adjoining the property in question.

The right of passage which a lot owner enjoys along a street in common with the rest of the public is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street. This is a right which he enjoys in common with other citizens of the Commonwealth, and of which the Legislature may deprive him without depriving him of any property. The inconvenience which he suffers is the same as that suffered by the rest of the community and for which he has no individual right of action.

Elliott on Roads and Streets, 526, 662.
24 Am. and Eng. Ency. of Law, p. 121.

The other rights of the lot owner in a street, viz, the rights of light, air and access are peculiar to him, and are not shared by him with the community at large. A municipal corporation, if the authority is given it by the Legislature, has a right to make any use of a street which it may see fit and the damage will be *damnum absque injuria* so far as the lot owner is concerned, provided no one of the rights peculiar to him as the owner of a lot is taken away. In this case none of the rights peculiar to this lot owner are interferred with. He has the same light, the same air and the same access to his property that he had before, and the only damage claimed to be suffered is that his property has diminished in value because he has not as convenient a way to and from Canal street. This may be true, but this damage he suffers in common with the rest of the community; it may also be true that this damage may be greater to him because of the fact that he is nearer to the closed portion of the street, but that is a difference in degree and not in kind, and to entitle him to recovery, the damage suffered must be different in kind and not simply in degree from that suffered by the rest of the community. The action of the city must in some way deprive him of one of the three peculiar rights growing out of the fact that he owns property abutting on the street.

Elliott on roads and streets, page 262–263.

In addition to the cases and text books already referred to, an examination of the following decisions of courts of last resort. will show that the foregoing principles are almost universally held to be correct:

The case of *Buhl* vs. *Fort Street Union Depot*, 98 Michigan, 596, was as follows:

The common council of the city of Detroit, vacated that portion of Fourth street extending from Congress street to Fort street, and the Fort street Union depot occupied the vacated portion of the street for depot purposes, under an amendment to the Union Depot act, authorizing any corporation organized under said act, with the consent of the common council of any city, etc., to occupy and close any highway, street or alley, within the limits of its station and depot grounds, requiring such company to pay to the parties entitled to the same, any and all damages that may accrue to them in consequence of the closing of any such highway, street or alley.

The property of the plaintiff did not abut on the closed portion of the street, and the damage he claimed, was that his property was made less accessible, and thereby diminished in value, it being necessary to make a detour to Third street instead of passing directly through what was formerly a part of Fourth street, so as to reach Congress street, and it was conceded that the value of his property had been diminished. The court held that the distinct question of whether the discontinuance of the public street, or its appropriation to other purposes than that of a highway, constitutes the taking of the property of the users generally, (other than abutting owners) has been distinctly ruled in the negative, referring to many decided cases on the subject. The court after citing and examining many decisions, comes to this conclusion, "we think the weight of authority in this country fully sustains the contentions of the defendant that such an injury as that resulting to the plaintiff here, is one which he suffers in common with the general public, and is *damnum absque injuria*." But it is contended by the plaintiff that unless the amendatory act is so construed as to give the plaintiff a right of action in the present case, the provision that damages may be recovered, is rendered wholly nugatory, as it is urged that only such streets as are within the depot ground are permitted to be vacated, and that there are no

abutting owners who could be injuriously affected by the closing of such streets And as applied to the present case, such is possibly the result of this construction. But the act is general and applies to all depot companies. The street which passes through the depot grounds may be a *cul de sac* and in such case the closing of a street might leave the owner of property without any means of egress whatever. In such case, undoubtedly, his right to damage would be as clear for the interruption of his means of ingress and egress as would be that of the abutting owner for a similar interference with a like right. The Circuit Court Judge directed a verdict for the defendant on the ground that the plaintiff was not entitled to recover any damage for the closing of the street in question. We think this conclusion was right and the judgment should be affirmed."

The case of *Glasgow and others* vs. *City of St. Louis and others*, 107. Mo. 198, decided by the Supreme Court of Missouri in 1891, was as follows:

providing

The city of St. Louis passed an ordinance ~~requiring~~ that so much of Papin street as lies between Twelfth and Thirteenth streets, is hereby vacated as a public street. It was charged in this case that there was a combination on the part of the officers and agents of the city with the Iron Company to wrong and injure the plaintiffs. The court held that there was no combination to injure anybody. The charter of the city of St. Louis was practically the same as the charter of the city of Richmond. The court held that there was no doubt that a property owner had an easement in a street upon which his property abuts which is special to him and should be protected, but in that case the plaintiffs owned no property fronting or abutting on the part of the street which was vacated. They were obliged to go a little further to reach Twelfth street, but that was an inconvenience different in degree only from that suffered by

all other persons, and it furnished no ground whatever for injunctive relief. Nor were the plaintiffs entitled to any relief by reason of the Constitution of Missouri which the court will observe is very different from the Virginia constitution, namely, "*that private property shall not be taken or damaged for public use without just compensation.*" The court held that to entitle plaintiffs to relief because their property was damaged, though not taken, they must show a special injury. There being no evidence of physical interference with their property, nor that any right or easement connected therewith or annexed thereto was affected, they suffered no injury which was special or peculiar to them. The city was there pursuing a power to vacate streets conferred upon it in express terms, and the court held that the principle was not affected in the least, by the fact that the Iron Company took possession of and used the portion of the street that was closed.

The case of *Stanwood* vs. *City of Malden*, 157 Mass., 17, was decided by the Supreme Court of Massachusetts, June, 1892, and was a case where suit was brought to recover damages for the discontinuance of a part of Summer street which ran obliquely into Florence street just opposite plaintiff's lands. The plaintiff's means of access to his property remained ample but its money value was diminished by diverting the travel away from his property through the closing of a part of Summer street. The court held, following a long line of Massachusetts decisions and quoting decisions from almost every other State, that there was no sufficient foundation laid for a claim for damage on account of the discontinuing of a highway, by showing that property had suffered by the diversion of travel or that the owner found travel less convenient, provided the access to and from his property was not interfered with.

The case of *State* vs. *City of Elizabeth*, 54 N. J. L., 462, was decided by the Supreme Court of New Jersey in June, 1892. In this case the Common Council vacated a portion of York

street in Elizabeth, New Jersey. The plaintiff owned land fronting on York street but it did not front on the portion of York street which was vacated. When York street was opened or extended her property had been assessed for benefits and the very portion of the street for which she had paid to have opened was closed, and closed for the benefit of an individual. From this statement it will be seen that this was a case that would appeal very strongly to the court, and yet without any dissent the court held that the action of the council in closing the street was justified under the charter of the city and the fact that the property of the plaintiff was diminished in value was no ground for recovery.

In addition to the cases that have been examined the court is referred to the following cases to support the proposition that when a part of the street is vacated, those whose property does not abut upon the vacated portion, and who have access to their property by the remaining portion of the street, cannot complain.

Pollak vs. *Trustees of San Francisco Orphan Asylum*, 48 Cal., 490.
East St. Louis vs. *O'Flynn*, 119 Ill., 200.
Dempsey vs. *Bullington*, 66 Iowa, 687.
Heller vs. *A. T. & S. F. Railroad Co.*, 28 Kansas, 625.
Castle vs. *County of Berkshire*, 11 Grey, 26.
People vs. *Supervisors*, 20 Mich., 95.
Petition of Concord, 50 N. H., 530.
Kings County Fire Insurance Company vs. *Stevens*, 101 N. Y., 411.
McGee's appeal, 114 Penn. St. 470.
Dantzer vs. *Ind. M. R. Co.*, 141 Ind., 604.

If the court will examine the autorities relied on by counsel for plaintiff in error in his brief, it will see that counsel has attributed a meaning to the words "abutting property owners," and the word "access," different from what the courts

intended, and it will find that no case is cited where it has been held that a plaintiff was entitled to damages, or that his property was taken when a portion of a street not adjacent to his lot was vacated, unless it be some English case, and the court will see that the doctrine in England is different from what it is generally in the United States, because of the English Statutes. See particularly what is said on this subject in the case above referred to of *Buhl* vs. *Fort Street Union Depot*, 98 Michigan, 596.

The case of *Rigney* vs. *Chicago*, 102 Illinois, page 64, relied on by plaintiff in error, is not a case in point, as there was no question of the closing of a small portion of a street involved. Furthermore, that case was decided by a divided court, a bare majority of the judges uniting in the opinion, and the Chief Justice who concurred in the general views expressed in the opinion, held that some expressions therein needed limitation. Furthermore the case turned on the language of the present Constitution of Illinois, which provides that "private property shall not be taken *or damaged* for public use without just compensation," and but for the change in the Constitution, the decision would have been the other way. The Constitution of Virginia, and of the United States, are the same as the former Constitution of Illinois.

The case of *City of Chicago* vs. *Union Building Association*, 102 Illinois, page 379, was a case of the closing of a portion of a street, and at page 393, the court adopts, as correct, the conclusions of Mr. Edmund H. Bennett as to cases of this kind, and holds:

"1. For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than another.

"2. An action will lie for peculiar damages of a different kind, though even in the smallest degree.

"3. The damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort.

"4. The fact that many others sustained injury of exactly the like kind is not a bar to individual actions in many cases of a public nuisance."

The case at bar clearly comes under the first head, viz: an obstruction of a public and common right to pass along Eighth street; and any damages suffered by the plaintiff in this case must be of the same kind as those sustained by the general public. It may be that his damages are greater, but they are necessarily of the same kind.

The case of *Chicago* vs. *Taylor*, 125 U. S., 161, reviews at length the Illinois cases prior and subseqnent to the adoption of the present constitution of Illinois, and particularly the *Rigney case*, and shows that the *Rigney case* differs from the previous decisions because of the addition to the constitution of the words "or damaged." Mr. Justice Harlan says at page 168:

"The use of the word 'damaged' in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870, gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former constitution."

It is respectfully submitted that no conclusion is reached by the court in *Dantzer* vs. *Ind. M. R. Co.*, 141 Indiana, 604, fav-

orable to the position taken by counsel for plaintiff in error. It is true that the court in the course of its opinion says: "that the obstruction of the easement of access, need not always be upon the front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the lot owner is invaded and he may recover," but the conclusion reached by the court in the case is exactly the conclusion reached by the courts of all other States, with the exception, possibly, of Ohio and Kentucky, viz; that an obstruction in a public street under legislative authority, which merely compels the use of a more circuitous route to reach property abutting on the portion of the street not closed, does not give the property owner a right of action. The court reaches this conclusion after the examination of a large number of authorities including the case of *Pennsylvania Co.* vs. *Stanley*, 10 Indiana Appeal, 421, relied on by the plaintiff here. The *Stanley case* turned on the fact that the alley was only sixteen feet wide and the obstruction of one end of the alley created a *cul de sac* which having once entered, one could not get out of. That of course was the destruction of the alley as a means of access as complete as if the alley had been closed up at both ends. An examination of the facts in the *Dantzer case* will show that it is a case on all fours with the case now before the court.

Counsel for plaintiff in error suggests that there is a *cul de sac* in this case but unfortunately for his suggestion this is corner property fronting on Eighth street thirty-eight feet four inches and running back along Cary street for a distance of fifty feet, (record pages 14–15). Eighth street is sixty-five feet wide and Cary street sixty-five feet four inches wide (plat, record page 18). The suggestion then of a *cul de sac* in this case is not pertinent.

The case of *Johnson* vs. *The Old Colony Railroad Co.*, 18 Rhode Island, 642, also relied on by the plaintiff in error,

turned on the fact that the plaintiff had a private right of way in the street which was closed, as distinguished from the mere right of passage enjoyed by the public generally.

The case of *Eachus* vs. *Los Angelles Railway Co.*, 103 California, 617, also relied on by the plaintiff in error is not in point because the court will see that the street immediately in front of the plaintiff's lot was occupied by a depot company for the purpose of a railroad so as to prevent access from the street on to the lot of the plaintiff.

The case of *Stetson* vs. *Faxon*, 19 Pick., 147, was a Massachusetts case decided in 1837, and seems to be very much relied on by counsel for the plaintiff in error. Why he should have selected a case decided in 1837, when the Massachusetts reports are filled with many later decisions, one of the latest of which is *Stanwood* vs. *City of Malden*, above referred to, is difficult to see. If it is in conflict with the later decisions, then it is an overruled case and can have but little weight. So far from *Stetson* vs. *Faxon* supporting the position of counsel for the plaintiff in error, it is a direct authority in support of the law as contended for by counsel for the defendants in error. The plaintiff owned a warehouse facing southerly on a way which had been used and recognized by the city of Boston as a street for more than sixty years. The city laid out a new street just to the south of this ancient one, and thereafter sold to the defendant, who also had a warehouse to the east of the plaintiff's, and separated therefrom by a narrow alley and facing the ancient way, the fee in this ancient way in front of his warehouse to the north line of the new street. The defendant then proceeded to erect a warehouse on his original lot and extending over that portion of the ancient way bought by him from the city. The plaintiff brought his action for damages because this new structure extended beyond the plaintiff's building thirty-six feet, obscuring and darkening the plaintiff's warehouse and obstructing the free communication therewith, and blocking the alley, etc., there was a verdict for the plaintiff for $4,010.12.

The court held that they were satisfied from the evidence that the place where the plaintiff's warehouse was erected, was a public highway by prescription, and the *evidence does not show that it has been legally discontinued*. The court held further that the sale of the land by the city to the defendant would pass the estate if the city owned it, which was not decided, but it would be subject to the public easement and a building erected thereon would be a public nuisance, notwithstanding the deed from the city. That the making and the paving of the new street by the city near the old one did not amount to a discontinuance of the ancient way. This case then is simply the case of an individual obstructing the highway, causing special damage (deprivation of light, air and access) to another individual, for which he has a right of action. In the case under consideration, the city of Richmond had closed the highway without causing special damage to plaintiff, and there being no highway, it makes no difference to the plaintiff what structures were erected in the closed portion nor what use the closed portion was put to, the motives actuating the council of the city of Richmond cannot be enquired into.

The case of *Bentley* vs. *City of Atlanta*, 92 Ga. 623, cited by counsel for the plaintiff is not a parallel case to the one under argument. The Bentley case was not a case where a street was closed, but from the statements made in the declaration the city of Atlanta had put the street in such a condition that persons using the street were unable to pull up the grade and their wagons backed against and into the house of the plaintiff, one special cause of damage being that one of the city carts loaded with garbage and refuse matter of every kind, being unable to pull up the grade, backed and dumped the contents of the cart into the plaintiffs dining room, thereby frightening and insulting his family, and various other similar causes of complaint were set forth in the declaration. The court evidently considered that the plaintiff in his declaration had made out a case of nuisance,

kept and maintained in a street by the city of Atlanta, and this was the only legal point decided. Surely this cannot be considered as parallel to a case where a city, acting strictly in accordance with the powers conferred on it by the Legislature, when in the opinion of its council, whose action cannot be reviewed by the court, nor can their reasons therefor be gone into by the court, closes a street and certain erections are made in the closed portion thereof.

The New York cases relied on by plaintiff in error are simply cases in which the right of access, light or air had been impaired, which of course could not be taken without compensation.

The case of *Balt. & Pot. R. R. Co.*, vs. *Fifth B. Ch.*, 108 U. S., 317, is not in point as is shown by the quotation therefrom in brief of counsel for plaintiff in error. It was the simple case of a nuisance created by a person on his own premises causing special damage to his neighbor. The court says:

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams or matters in which the public have an interest and over which the public have control."

The case of *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 166, was a case where property was practically taken. Mr. Justice Strong speaking for the court in *Transportation Co.* vs. *Chicago*, 99 U. S., p. 635, says at page 642:

"The extremest qualification of the doctrine is to be found, perhaps in *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 166. * * * * In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession."

Plaintiff in error contends that the ordinance shows that

there was a covert effort to divert a public street to a private use, and that the city violated its duty imposed by its charter to prevent the encumbering of street etc., in any manner whatever; but this contention is not pertinent because the reasons and the necessity for closing a street rest in the discretion of the city council and are not the subject of review by the courts. The city is also equally charged with the duty of closing streets, whenever in the judgment of its council, the public good requires this to be done; and if it were proper to go into the discussion, there would be no difficulty in showing a most urgent necessity that the council of the city of Richmond should have done exactly what it did do. That no one is in truth and in fact damaged by what it did do, is very naturally to be inferred when it is considered that it took this plaintiff some ten years to find out that his *property* had been taken from him without due process of law, and even his learned counsel does not seem to have been aware of this deprivation until he had failed to win the case as he at first conceived it to be.

It will thus be seen that no case has been cited, and it is respectfully submitted that no case can be cited, similar to the case at bar, where a plaintiff has been held entitled to damages for the closing of a portion of a street by legislative authority, when the closing of the street does not interfere with the access to plaintiff's property by the remaining portion of the street and the other streets adjoining plaintiff's property. To do so would necessarily require the court to hold that the right of passage along a street enjoyed by the public generally, was a right of property which could not be taken without compensation made therefor, and it has never been claimed that the right to the use of a highway is the individual property of each person who may desire to use said highway. As before shown the closing of the end of Eighth street simply prevents this plaintiff from travelling along Eighth street from his property into Canal steeet. This is the sole right that is taken from him and this right he enjoys in com-

mon with the rest of the community, and any damage that he may suffer in consequence of being deprived of this right, is of the same kind as that suffered by the rest of the community and is necessarily *damnum absque injuria*. It makes no difference that his damages for the deprivation of this right are greater than that of a person on Eighth street one block or ten blocks further off, because to entitle him to recover he must show that his damage differs in kind and not in degree.

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia is right and should be affirmed.

H. T. WICKHAM,

HENRY TAYLOR, JR.

For the Chesapeake & Ohio Ry. Co.

APPENDIX.

Extracts from the charter of the city of Richmond.

Virginia Acts of Assembly, 1869--70, pp. 120--146.

SECTION 19. The city council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city and of all property, real and personal belonging to the said city; and may make such ordinances, orders and by laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders and regulations as they may deem desirable to carry out the following powers which are hereby vested in them:

* * * * * * * * *

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under said streets, and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its work, the streets of the city, without the consent of the council. In the meantime no order shall be made and no in-

junction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

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SECTION 22. The council shall not take or use any private property for streets or other public purpose without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law.

LAW OF VIRGINIA IN REGARD TO CONDEMNATION OF PROPERTY.

Code of 1887, Sections 1074 to 1084 inclusive.

SEC. 1074. *Commissioners to ascertain value of land, where it cannot be agreed on*.—If the president and directors of a company incorporated for a work of internal improvement, the court of a county, the council of a city or town; the Institution for the Deaf and Dumb and the Blind, or any of the State lunatic asylums cannot agree on the terms of purchase with those entitled to lands wanted for the purpose of such company, county, city, town, institution or asylum, five disinterested freeholders (any three of whom may act), shall be appointed by the court of the county

or corporation in which such land, or the greater part thereof, lies, for the purpose of ascertaining a just compensation for such land.

SEC. 1075. *Notice to be given of application for their appointment.*—When it is intended to apply for such appointment, ten days' previous notice thereof shall be served on the tenant of the freehold, or his guardian or committee. If there be no such tenant, guardian or committee, within the county or corporation, the notice instead of being thus served may be published once a week for four successive weeks, in some convenient paper and posted at the front door of the court-house of the county or corporation, on the first day of the term next preceding the application.

SEC. 1076. *Their appointment.*—Upon its appearing that such notice has been so given, the court shall appoint such commissioners, and in the order appointing them shall designate the day for them to meet. Any one or more of them attending on the land may adjourn from time to time until the business shall be finished.

SEC. 1077. *Their oath.*—Before executing their duties they shall take an oath, which shall be certified in substance as follows: " county (or corporation), to-wit: I, a justice for the said county (or corporation), do certify, that , have this day made oath before me, that they will faithfully and impartially ascertain what will be a just compensation for such of the land of the freehold, whereof is tenant, as is proposed to be taken by the company (or the town, city, or county of , or the Institution for the Deaf and Dumb and the Blind, or any of the lunatic asylums) for their purposes, and will truly certify the same. Given under my hand this day of ."

SEC. 1078. *Their duty and the report they shall make.*—The commissioners, after viewing the land and hearing such proper evidence as either party may offer, shall ascertain what will be a just compensation for the said land and for the damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue, from the work to be constructed, and shall make a report to the following effect: "We, , appointed by the county (or corporation) court of , by its order of the day of , to ascertain what will be a just compensation for such part of the land of the freehold whereof is tenant, as is proposed to be taken by the company (or the town, city or county of , or the Institution for the Deaf and Dumb and the Blind, or of any of the lunatic asylums), for their purposes, do certify, that on day of , the day designated in the said order (or the day to which we were regularly adjourned from the day designated in the said order), we met together on the said part of the land, the limits of which part were then and there described to us as follows, to-wit: (Here set forth the width and length of the particular part, and describe the same in such manner as to make it reasonably certain.) And after being first duly sworn, upon a view of the part aforesaid, and upon such evidence as was before us, we are of opinion and do ascertain that for the said part, and for the damage to the residue of the tract beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, will be a just compensation. Given under our hands this day of ."

SEC. 1079. *Proceedings of court on report; how title to land vested.*—The said report and the certificate of the justice shall be forthwith returned to the court of the county or corporation; and

unless good cause be shown against the report, the same shall be confirmed and recorded. The sum so ascertained to be a just compensation may be paid to the person entitled thereto or into court. Upon such payment, the title to that part of the land for which such compensation is allowed shall be absolutely vested in the company, county, city, town, institution or asylum, in fee-simple, except in the case of a turnpike company where a sufficient right of way only for the purposes of such company shall be vested.

SEC. 1080. *When new commissioners appointed.*—If, however, good cause be shown against the report or if the commissioners report their disagreement, or if they fail to report within a reasonable time, the court may, without further notice, as often as seems to it proper, appoint other commissioners; and the matter may be proceeded in as before prescribed.

SEC. 1081. *Corporation on paying damages may proceed with work; no injunction to be awarded.*—Whether any such new appointment be made or not, the company, county, city, town, institution or asylum, on paying into court the sum ascertain by the previous report, may, notwithstanding the pendency of proceedings, enter into and construct their work upon or through that part of the land described in such previous report. And no other shall be made nor any injunction awarded by any court or judge to stay the proceedings of the company, county, city, town institution or asylum, in the prosecution of their work, unless it be manifest that they, their officers, agents or servants are transcending their authority and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

SEC. 1082. *Judgment on subsequent report.* When, after such payment into court, a report is made which is confirmed if the sum thereby ascer-

tained exceed what was so paid, judgment shall be given against the company, county, city, town, institution or asylum, for the amount of such excess; and if what was so paid exceed the sum ascertained by the second report, the excess shall be paid back to the company, county, city, town, institution or asylum. If the sum ascertained by the report which is confirmed be not more than the sum ascertained by the first report, the party applying for the appointment of other commissioners shall pay the costs occasioned by such application, unless the original report was set aside on some other ground than that of insufficiency of compensation.

SEC. 1083. *Effect of judgment and payment thereof.*—The company, county, city, town, institution or asylum, when such judgment is rendered against it shall thereafter have no right to possession of the land until the judgment is satisfied. From the time of such satisfaction by the payment of the money to the persons entitled thereto, or into court, or from the time of the confirmation of the subsequent report, if no additional compensation be thereby ascertained, or from the time of the termination of the proceedings, if they be determined without such confirmation, the title to the land shall be absolutely vested in the company, county, city, town, institution or asylum, in fee-simple.

SEC. 1084. *How the money disposed of when paid into court.*—To enable the court to dispose properly of any money so paid into court, it may have inquiries by a commissioner to ascertain what persons are entitled thereto, and in what proportions; and may make an order of publication, requiring all interested to appear before the commissioner that their respective claims may be passed upon. After such reference to a commissioner, and such publication, the court shall make such disposition of the money so paid into court as may seem to it right.

UNITED STATES *v.* WARDWELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 53. Argued October 20, 1898. — Decided November 28, 1898.

Three cheques were drawn in June, 1869, by authorized army officers upon the Assistant Treasurer of the United States in New York, in favor of Wardwell and in payment of his lawful claims against the United States. These cheques, while in his possession, were lost or destroyed, presumably in a depredation made on his house by hostile Indians in 1872. Not having been presented for payment, the amount of these cheques was covered into the Treasury in pursuance of the statutes of the United States, and was carried to the account of "outstanding liabilities." Wardwell having died, his administratrix applied to the Treasury for payment of the cheques by the issue of Treasury warrants, under the authority conferred by Rev. Stat. §§ 306, 307, 308. This payment being refused, this suit was brought in the Court of Claims in April, 1896, and the statute of limitations was set up as a defence. *Held*, that the promise by the Government contained in the statute to hold money so paid into the Treasury was a continuing promise available to plaintiff at any

Statement of the Case.

time she saw fit, to which full force should be given; that there was no cause for a suit until after refusal of an application for a warrant, and that then for the first time a claim for the breach of the contract accrued, and the limitation, prescribed by Rev. Stat. § 1069, began to run.

THIS is an appeal from the Court of Claims. The facts as found by that court are that in June, 1869, three cheques were drawn in favor of William V. B. Wardwell, one by Major W. B. Rochester, paymaster, United States Army, and two by Major M. I. Ludington, quartermaster, United States Army, all drawn on the Assistant Treasurer of the United States in New York, and in payment of lawful claims of Wardwell against the United States. Subsequently to the issue of the cheques and while still in the possession and ownership of Wardwell they were lost or destroyed, probably in a depredation committed on his house by Indians in the year 1872. None of the cheques having been presented for payment the amounts thereof were covered into the Treasury of the United States and carried to the account of "outstanding liabilities" in pursuance of the act of May 2, 1866, now sections 306 and following, Revised Statutes, the entry on the books of the Treasury (as shown by a report made by the Secretary of the Treasury to the House of Representatives) being as follows:

Name.	Period.	Balance due United States.	Balance due from United States.
W. V. B. Wardell.....	1872	.....	$461 87
William V. B. Wardwell..	1872	.....	500 00
Do.	1872	.....	1,017 30

No part of the same has ever been paid. Wardwell is dead and the claimant is his duly appointed and acting administratrix. As such she in 1890 applied to the Treasury Department for payment of the cheques by the issue of Treasury warrants and at the same time filed a bond of indemnity, with sufficient sureties, for double the amounts thereof, to secure the United States against a possible second demand for payment. The First Comptroller of the Treasury declined to per-

mit the settlement of a new account or the issue of warrants in favor of the claimant. Thereafter, and on April 10, 1896, she commenced this suit. As a conclusion of law the court found that the statute of limitations did not begin to run until the 14th day of April, 1890, the time when the accounting officers of the Treasury refused to recognize the claimant's demand, and that she was entitled to recover the amount of the three cheques, and on the 11th day of January, 1897, entered judgment for that amount. From such judgment the United States appealed to this court.

Section 1069, Revised Statutes, provides:

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

The act of May 2, 1866, c. 70, is entitled "An Act to facilitate the Settlement of the Accounts of the Treasurer of the United States, and to secure certain Moneys to the People of the United States, or to Persons to whom they are due, and who are entitled to receive the same." 14 Stat. 41.

This was carried into the Revised Statutes as sections 306 and following. Sections 306, 307 and 308 read:

"SEC. 306. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts or cheques, issued by the Treasurer, or by any disbursing officer of any department of the government, upon the Treasurer or any Assistant Treasurer or designated depositary of the United

Counsel for Appellants.

States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant and to be carried to the credit of the parties in whose favor such certificates, drafts or cheques were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'

"SEC. 307. The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer to facilitate the payment of a warrant directed to him for payment has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly endorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts and cheques.

"SEC. 308. The payee or the *bona fide* holder of any draft or cheque the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States."

Mr. George Hines Gorman for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. George A. King for appellee. *Mr. Edward E. Holman* was on his brief.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance. *Finn* v. *United States*, 123 U. S. 227.

Counsel for the government contend that the claim against the United States first accrued in 1869, when the cheques were issued, or, if not then, at least in 1872, when they were lost or destroyed, and, therefore, this being twenty-four years before the commencement of this suit, that the claim was barred. If there were nothing to be considered but the single section referred to it would be difficult to escape this conclusion of counsel.

It is further contended that sections 306, 307 and 308 relate to what is simply a matter of bookkeeping, and do not in any manner change the scope of the liability of the Government. But we are of the opinion that they mean something more. While it may be that they do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a promise by the Government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given. If bookkeeping was the only matter sought to be provided for, there were no need of section 308. That prescribes payment, and payment in a particular way. The payee does not simply surrender his cheque and receive money; but "on presenting the same to the proper officer" he is "entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor." This may be mere machinery for payment, but it is machinery not used or required until after the money has been "covered into the

Treasury by warrant" and "carried to the credit" of the payee. The right given is the right to surrender the cheque and receive a warrant on the Treasury. It will also be noticed that the purpose of the act of 1866 was, as expressed in its title, not merely to "facilitate the settlement of the accounts of the Treasurer of the United States," not merely to perfect a system of bookkeeping, but also "to secure certain moneys . . . to persons to whom they are due, and who are entitled to receive the same." And the deposit by the Treasurer is not of a gross amount to be applied to any claims that may arise, but of the amount due for certain specified cheques and drafts. In other words, the purpose of the government by this statute is to secure to each party who holds government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. Congress has directed that the money already once appropriated and chequed against shall be placed in the Treasury and held subject to the call of the party for whose benefit it has been so appropriated and chequed. There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section 308 is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section 1069 begins to run. There is thus no conflict with that section. Its full force is not impaired.

In this connection it may be not amiss to notice those authorities in which it is held that upon the ordinary deposit of money with a bank no action will lie until a demand has been made, by cheque or otherwise, and that hence the statute of limitations will not begin to run until after a refusal to pay on such demand. In *Downes* v. *The Phœnix Bank of Charlestown*, 6 Hill, 297, 300, Bronson, J., delivered the opinion of the court, and, after referring to the ordinary rule that where there is a promise to pay on demand the bringing of an action is a sufficient demand, and criticising it as illogical, added:

"The rule ought not to be extended to cases which do not fall precisely within it. Here, the contract to be implied from the usual course of the business is, that the banker shall keep the money until it is called for. Although it is not strictly a bailment, it partakes in some degree of that character."

See also *Johnson* v. *Farmers' Bank*, 1 Harrington (Del.), 117; *Watson* v. *Phœnix Bank*, 8 Met. (Mass.), 217–221.

In *Dickinson* v. *Savings Bank*, 152 Mass. 49, 55, it was held that the statute of limitations would not begin to run in favor of the bank and against a depositor until there had been something equivalent to a refusal on the part of the bank to pay, or a denial of liability.

In *Girard Bank* v. *Penn Township Bank*, 39 Penn. St. 92, 98, 99, the holder of a certified cheque was the plaintiff, and, the cheque having been outstanding more than six years, the statute of limitations was pleaded; but the plea was not sustained, the court, by Strong, J., saying, in respect to the case of an ordinary deposit:

"Were this a suit against the Bank of Penn Township by the original depositor the statute of limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows that no right of action exists, and the statute of limitations does not begin to run until the demand stipulated for in the contract has been duly made."

And the rule thus announced in respect to ordinary deposits was held to apply in case of a certified cheque:

"When a cheque payable to bearer, or order, is presented with a view of its being marked 'good,' and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the cheque, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused."

In Morse on Banks and Banking, page 40, 2d ed., the author says:

"We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking, it may be said, even of the debt itself. In short, the agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, is only to pay upon demand; accordingly, until there has been such demand, and a refusal thereto, or until some act of the depositor, or some act of the bank made known to the depositor, has dispensed with such demand and refusal, the statute ought not to begin to run, nor should any presumption of payment be allowed to arise."

It is not meant to be asserted that the authorities are unanimous on this question; on the contrary, there is a diversity of opinion. It is sufficient for the purposes of this case to notice that the rule finds support in the decisions of many courts of the highest standing. It is not inconsistent with the proposition laid down by this court in *Marine Bank* v. *Fulton Bank*, 2 Wall. 252, and often reaffirmed, *Phœnix Bank* v. *Risley*, 111 U. S. 125, and cases cited in opinion, to the effect that the relation between a bank and its depositor is that of debtor and creditor and nothing more, for that proposition throws

no light upon the question when the debt of the debtor becomes due, and when the statute of limitations begins to run. Neither is it pretended that the relation of the United States to this petitioner was that of bank and depositor, but the reasoning of the authorities cited strengthens the conclusion that when Congress declared that this money should be covered into the Treasury to the credit of the plaintiff, and that she should, on presentation of the cheques to the proper officer of the Treasury, be entitled to a settlement of an account and the issue of a warrant, it was the intention to recognize a continuing obligation — one which was available to the plaintiff at any time she saw fit, that it was a promise which was not broken until after demand and refusal.

But authority more in point is not wanting to sustain these views. The direct tax act of August 5, 1861, c. 45, 12 Stat. 292, provided, in the thirty-sixth section, that, in case of a sale of real estate, and a surplus remaining after satisfying the tax, costs, etc., such surplus should be paid to the owner, or if he be not found, "then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who upon such application shall, by warrant on the Treasury, cause the same to be paid to the applicant." In *United States* v. *Taylor*, 104 U. S. 216, the owner did not apply for the surplus until more than six years had elapsed from the closing up of the sale and the deposit of the money in the Treasury, and it was held that section 1069 did not bar his action, the court observing (p. 221):

"This section limits no time within which application must be made for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an in-

definite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

"A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the Government to say to the owner that the surplus proceeds should be held in the Treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

"The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the statute of limitations will begin to run against him from the time such knowledge is brought home to him, and not before.

* * * * *

"In analogy to this rule the right of the owner of the land to recover the money which the Government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued."

This was reaffirmed in *United States* v. *Cooper*, 120 U. S. 124. Counsel distinguish those cases from this in that there the money came into the Treasury subject to an express trust created by the act of Congress, which directed that it be there held for the benefit of the owner, while here in the first instance there was a written promise by the Government, a promise for which an appropriation had been made and upon which a cause of action existed. But while there is a difference, we do not think it sufficient to create a different rule or measure of liability. There is no new deposit when a cheque is certified, but as shown by the opinion in *Girard Bank* v. *Bank of Penn Township*, *supra*, this fact works no change in

the rule. Whether the money to satisfy this liability was paid in by some third party or already held by the Treasurer; whether there was or was not any prior liability on the part of the Government, in each case there was a declaration by Congress that the money thus received or covered into the Treasury should there be held for the benefit of and subject to the call of the owner, and no time was specified within which such call must be made. This was a distinct and separate promise, creating a new liability, and the claim accrued when this new liability matured. It matured when the claimant presented her cheques and, calling for warrants, was refused them.

The judgment is

Affirmed.